

CLERK'S COPY.

Petition for certiorari not printed

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1943

No. 159

**MRS. EULA MAY WALTON, AS ADMINISTRATRIX
OF FRED WALTON, DECEASED, PETITIONER,**

vs.

SOUTHERN PACKAGE CORPORATION

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF MISSISSIPPI**

PETITION FOR CERTIORARI FILED JULY 13, 1943.

CERTIORARI GRANTED OCTOBER 11, 1943.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 159

MRS. EULA MAY WALTON, AS ADMINISTRATRIX
OF FRED WALTON, DECEASED, PETITIONER,

vs.

SOUTHERN PACKAGE CORPORATION

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF MISSISSIPPI

INDEX

	Original	Print
Agreed statement of facts in Circuit Court of Claiborne County	48	1
Opinion of Supreme Court of Mississippi	59	5
Order extending time within which to file petition for certi- orari	86	17
Order granting motion for leave to proceed <i>in forma pau-</i> peris	87	17
Order allowing certiorari	88	18

IN CIRCUIT COURT OF CLAIBORNE COUNTY,
MISSISSIPPI

No. 3169

MRS. EULA MAE WALTON, Administratrix of Estate of
Fred Walton, Deceased

vs.

SOUTHERN PACKAGE CORPORATION

AGREED STATEMENT OF FACTS—Filed April 25, 1942

The plaintiff and defendant submit the above styled cause for trial before the Circuit Judge, (each party waiving a jury), on the following stipulation of facts:

(1) That the defendant is a corporation organized under the laws of the State of Delaware; and is engaged in operating a veneer plant at Port Gibson, Mississippi, at which plant it manufactures veneer from logs. *That a substantial part of the products so manufactured by the defendant are shipped outside of the State of Mississippi.* That the defendant was engaged in the same business under the same circumstances above alleged prior to January 1, 1938; and it was engaged in said business during the period from August 1, 1939, to April 1, 1940.

(2) That the plaintiff's decedent, Fred Walton, was on the 14th day of August, 1939, an adult resident citizen of Port Gibson, Claiborne County, Mississippi, and on or about said date approached the defendant and sought employment as a night watchman at its Port Gibson plant. That the defendant, thereupon, employed said Fred Walton as a night watchman at said plant. That said plant *did not operate at night* during the period of the employment of plaintiff intestate, but did when business required it to operate at night during other periods; and the defendant was not engaged in the actual production of goods for interstate commerce during the period of time that said Fred Walton was on duty. Fires were kept under the boilers in said plant during the night by a fireman on duty [fol. 49] for said purpose. Occasionally, repairs were

made to the machinery at night by employees other than said Fred Walton. It was the duty of said Walton, as night watchman at said plant, to make an hourly round of the plant and punch a night watchman's clock located at various stations on said plant and to report any fires and trespassers. A record thereof was preserved, and Walton's services were rendered primarily for the purpose of reducing the fire insurance rates or premiums upon the buildings, machinery, and fixtures situated on said premises. Except for the reduction obtained in said insurance rates, a night watchman would not have been employed, and such services were not necessary nor used in connection with the actual production of veneer or other timber products for shipment in interstate commerce, and said Walton performed no service in connection with the actual manufacturing of veneer or other products.

(3) That during the period of time that said Fred Walton was employed by the defendant, he was paid for his services the amount that defendant contracted to pay him, which amount is agreed upon as the actual value of said services.

(4) That the defendant's witnesses if present in Court would testify that the amount that Fred Walton was paid for his services was more than said Fred Walton could have obtained from any other employment during the period of time that he was employed by the defendant, and that the attorney of said plaintiff has no way of disproving said testimony, but object to the same on the ground that such testimony is inadmissible and it is agreed and stipulated that said testimony shall be considered as being introduced before the Court by defendant, and objected to, and that the Court shall pass upon its admissibility, and if inadmissible, eliminate it from its consideration in passing upon this cause, and if the Court should rule said testimony to be inadmissible, the defendant will be regarded as having taken exception to such ruling and shall be entitled to raise said point on appeal. And it is desired and both parties request [fol. 50] that the court shall indicate its ruling on the admissibility of said testimony.

(5) That no suit or claim has been filed for the minimum wage, and it is agreed that no amount is due hereunder not claimed in this suit for alleged failure to pay the minimum

wage, and that said minimum wage provision of the Fair Labor Standards Act is not involved herein, but that if said Fred Walton was entitled to receive overtime, as provided for under the Fair Labor Standards Act (Title 29 U. S. C. A., Sections 201 to 216) that there would have accrued under the provisions of said Act an additional sum of \$400.00 for overtime, of which amount \$376.00 accrued more than one year prior to the filing of this suit, and the balance of the above amount within one year from the filing of the declaration in this cause. Plaintiff also claims \$400.00 in addition under Section 16 B of said Act and defendant denies liability thereof.

(6) That during the lifetime of said Fred Walton he employed the firm of Berger & Gholson to constitute this suit, and said employment has subsequently been continued by his administratrix, the plaintiff herein, and all legal proceedings in this cause have been conducted by said attorneys as shown by the pleadings and briefs filed herein, and the plaintiff contends that if she recovers herein, a reasonable attorney's fee should be allowed by the Court under Section (B) of the Fair Labor Standards Act. The defendant denies any liability hereunder, including said alleged attorneys fee.

(7) That the defendant could have employed more than one person to perform said services at the same rate of pay per hour as was paid to said Fred Walton, and no overtime would have accrued, and that the defendant has in no wise profited by the use of one employee as a night watchman instead of dividing said employment among two employees. [fol. 51] If Fred Walton had not accepted his pay without protest, defendant would have employed two night watchmen and no overtime would have accrued. That Fred Walton requested said employment with full knowledge of his pay and of the hours of employment and accepted his pay at the rate agreed upon and did not complain or protest at his rate of pay nor the hours worked during the period of his employment nor afterwards prior to the filing of the suit.

(8) That suit was originally filed by Fred Walton, who subsequently died intestate, and the plaintiff, Mrs. Eula Mae Walton has qualified as the administratrix of his estate, and revived this suit in her name over the objection of the defendant.

(9) That the defendant has filed a plea of general issue and notice thereunder together with four separate special pleas, and that all of the pleadings filed by all parties in this cause are to be considered in issue, and that it is further agreed that the defendant does not waive objections heretofore taken to the order reviving this suit nor to the order overruling the demurrer, nor to any other adverse ruling of this court in this matter, by entering into this stipulation, but that this stipulation is entered into solely for the purpose of avoiding the expense of producing witnesses at a trial, and that this cause is to be treated as if tried on this stipulation, and none of the rights of the plaintiff or defendant is waived thereby, except a trial by jury, but all objections and rights of the Plaintiff and Defendant are preserved and protected.

(10) It is further agreed that either party may appeal from the decision to be rendered by the Circuit Court of Claiborne County, Mississippi, and the said appeal shall relate to and include all decisions heretofore rendered [fols. 52-58a] and all orders and judgments rendered herein as well as the final judgment to be entered herein on this stipulation, and that on any appeal this stipulation as well as all pleadings in this cause shall be a part of the record.

Witness the signatures of the attorneys for each of the parties hereto on this the 25th day of April, 1942.

Berger & Gholson, Attorneys for Plaintiff, by Frederick C. Berger.

Henley, Jones & Woodliff, Attorneys for Defendant, by W. J. Henley.

[File endorsement omitted.]

[fol. 59] IN SUPREME COURT OF MISSISSIPPI

No. 35,152

SOUTHERN PACKAGE CORPORATION

VS.

EULA MAY WALTON, Admx., Etc.

In Banc: McGehee, J.

OPINION RENDERED FEBRUARY 15, 1943

This appeal presents for decision the following questions:

1. Whether a night watchman employed by a manufacturer of lumber and veneer products, a substantial portion of which are shipped out of the State of Mississippi, is engaged in producing goods for interstate commerce or in an occupation necessary to the production of goods for interstate commerce, so as to be entitled to the benefits of the federal "Fair Labor Standards Act of 1938" (52 Stat. at L. 1060, Title 29 U. S. C. A., sections 203, (j), 206, 207 and 216 (b)), where such night watchman performs no services other than making an hourly round of the plant at night, while it is not in operation, and punches a watchman's clock located at various stations on the premises of said plant, and is employed for the purpose of reporting any fires and trespassers, and who is kept on duty only in order to enable his employer to obtain reduced fire insurance rates or premiums upon the buildings, machinery, and fixtures situated on the premises, and except for which purposes it is admitted that he would not have been employed.

2. If the Act applies in favor of such watchman does a cause of action for "overtime, liquidated damages (or penalties), and attorney's fees" under the Fair Labor Standards Act, supra, survive the death of the employee, where neither the Act creating the right to recover such compensation or damages, nor any other federal statute, provides for such survival.

3. If the Act applies to such a watchman and the cause of action survives his death, does the Mississippi one-year statute of limitations (section 2301, Code of 1930) apply to

suits for the recovery of the amounts here claimed, as being penalties allowed against an employer for non-compliance with the terms of the Act.

The suit was filed in the Circuit Court of Claiborne County, on February 13, 1941, by Fred Walton, employee, against the appellant, Southern Package Corporation, employer, alleging the Corporation's ownership and operation of a box manufacturing plant in said county during the period of the plaintiff's employment, as night watchman, from August 14, 1939, to February 29, 1940, when he received for such services, less than the minimum wages per hour and was on duty for longer hours per week than are prescribed by the said Fair Labor Standards Act of 1938. It is also alleged that according to the terms of this Act, sections 206 and 207 thereof, he was entitled to receive one and one-half times his regular wages for all work done in excess of forty-four hours per week from August 14, 1939, to October 23, 1939, when the minimum wage in effect under said Act was twenty-five cents per hour; that he was entitled to receive one and one-half times his regular wages for all work done in excess of forty-two hours per week from October 23, 1939, to February 27, 1940, when the minimum wage prescribed under said Act was thirty cents per hour; and that under section 216 (b) of said Act he was entitled to an additional amount equal to the total wages due for overtime work and a reasonable attorney's fee.

[fol. 61] The sections of the Act above referred to provide for the relief claimed in the declaration under the facts therein stated, provided the plaintiff is entitled to the benefits thereof.

Fred Walton died on August 24, 1941, and the suit was thereafter revived, over the objection of the defendant, in the name of his widow, Mrs. Eula May Walton, as administratrix of the estate. Thereupon certain pleas of the defendant were permitted to be withdrawn to allow the filing of a demurrer, alleging no cause of action shown, the want of causal connection between the employment of Fred Walton and the production of goods for shipment in interstate commerce, and the nonsurvivability of the alleged cause of action. Upon the overruling of this demurrer, pleas were again filed and the cause submitted to the trial judge for decision upon an agreed statement of the facts, without the intervention of a jury, resulting in the rendition

of a judgment for the plaintiff in the sum of \$400 for overtime, an additional equal amount as liquidated damages, and an attorney's fee of \$100, or the total sum of \$900 and costs. From this judgment the defendant prosecutes this appeal.

It was stipulated in the agreed statement of facts that the nature of the business in which the defendant was engaged, the character and duration of the employment involved, and the duties of the employee thereunder, were as hereinbefore stated. It was further stipulated that if the employee was entitled to the benefits of the Fair Labor Standards Act (Title 29, U. S. C. A., Sections 206, 207 and 216 (b)), there would be accrued under the provisions of said Act the sum of \$400 for overtime, of which amount \$376 accrued more than one year prior to the filing of the suit, and the balance within one year thereof; that the plaintiff also claims an additional \$400, described as liquidated [fol. 62] damages under section 216 (b) of said Act, and a reasonable attorney's fee, liability for both of which sums the defendant denied; also, that "no suit or claim has been filed for the minimum wage, and it is agreed that no amount is due hereunder nor claimed in this suit for alleged failure to pay the minimum wage, and that said minimum wage provision of the Fair Labor Standards Act is not involved herein"; that the said Fred Walton was paid for his services the amount that the defendant contracted to pay him, "which amount is agreed upon as the actual value of said services"; that the defendant could have employed more than one person to perform said services at the same rate of pay per hour as was paid to said Fred Walton, and no overtime would have accrued, and that if he had not accepted his pay without protest, defendant would have employed two night watchmen, and thereby incurred no liability for time and one-half time for overtime, and that wherefore the defendant has in nowise profited by the said use of one employee as a night watchman instead of dividing said employment between two employees; and that the said Walton requested this employment with full knowledge of the time that he was to be on duty and of the pay that he was to receive, without complaint or protest until the filing of this suit.

It was also agreed that the plant did not operate at night during the period of Walton's employment, and that the defendant corporation was not engaged at night in the

production of goods for interstate commerce while he was on duty; that when fires were kept under the boilers in said plant at night, it was done by a fireman kept on duty for that purpose, and that when repairs were made occasionally at night to the machinery, such work was done by employees other than the said Walton—a stipulation which distinguishes the case from that of *Hart v. Gregory*, 218 N. C. [fol. 63] 184, 10 S. E. (2nd) 644, 130 A. L. R. 265, wherein the Court allowed recovery under the Act by a night watchman who was required to pump the boilers up at night to keep the water in them as long as the steam was up so they would not get dry, and where the Court said: "The present case we think comes within the provisions of the Fair Labor Standards Act, as the duties of this night watchman were more than that ordinarily required of one so termed. The duty of plaintiff was to keep water in the boiler so that in the morning steam could easily be available. If the boilers were not kept filled up at night, they would have burned dry and that would have ruined them and made them unfit for use."

In defining what constitutes goods produced for interstate commerce, section 203 of the Fair Labor Standards Act of 1938 (Title 29, U. S. C. A. p. 477, sub-section (j) states that the term: "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any state; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any state."

Thus, it will be seen that the portion of the language which is to be construed in determining whether the Act is to be applied to the employment of the night watchman in the case at bar are the words, "or in any process or occupation necessary to the production thereof, in any state," since he was manifestly not engaged in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods.

In adopting the foregoing and rather unusual definition of the term "produced", as related to the production of goods for interstate commerce, so as to include among [fol. 64] those engaged in such employment also those in any occupation "necessary" to the production of such

goods, it should be presumed that the Congress thus enlarged the meaning of the term as far as it was deemed expedient. Although numerous terms used in the Act are specifically defined therein, the meaning of the word "necessary" was left intact as found in Webster's Dictionary—"Essential to a desirable or projected end or condition; not to be dispensed with without loss, damage, inefficiency or the like; as, a necessary tool." Moreover, unless the term, "any occupation necessary to the production thereof" is to be given an expanded meaning by judicial construction, it may be confidently asserted that under the agreed statement of facts in the instant case, the Act would have no application, since the work of this employee had only the most tenuous relation, and was not in any fitting sense "necessary", to the production of goods by this employer for commerce. Presumably the night watchman slept during the day-time, while the other employees were engaged in the production of the goods for commerce. He contributed nothing to such work or production, nor to enable those engaged in production to more efficiently perform their duties. No more goods were produced by reason of his employment, and he would no doubt have been kept on duty for the purpose for which he was employed even if it had been necessary to close down the plant for an indefinite period because of a break-down, or on account of other incidents interfering with its continued operation. If the plant had been running at night, the services of a night watchman would not have been required at all, even to satisfy the request of the insurance company.

It was held in the case of *Hart v. Gregory*, supra, as heretofore indicated that a night watchman whose duties also include the pumping of water into boilers, so that they will not burn dry and be ruined, but will be fit for service [fol. 65] when production starts the next day, is engaged in an "occupation necessary to the production" of goods within the meaning of the Act here under consideration. In the course of its opinion, the Court made the observation, italicizing its language, that "it was necessary to have those boilers filled up with water and if they had not been kept filled up at night they would have burned dry and that would have ruined the boilers." The decision discloses that the turning point in the case entitling the night watchman to the benefits of the Act was the fact that he had these other duties to perform in addition to his regular duties as

a night watchman. After this case was remanded it was again tried, and on conflicting evidence the question was submitted to the jury as to whether the night watchman actually performed the services other than nightwatching, as claimed, and the jury decided this issue in the negative, and upon the second appeal the judgment denying liability was affirmed. 220 N. C. 180, 16 S. E. (2nd) 835; Vol. 1 Wage & Hour Cases, 1172. To the same effect is the case of *Wood v. Central Sand & Gravel Co.*, D. C. Tenn., 33 F. Supp. 40. In the case of *Jewel Tea Co. v. Williams*, 10 C. C. A., 118 F. (2d) 202, it is stated that the Act "does not extend to employment that merely affects interstate commerce. If there could be any doubt as to the correctness of this interpretation, it is set at rest by the legislative history of the Act." To the same effect is the case of *Chapman v. Home Ice Co.*, D. C. Tenn., 43 F. Supp. 424, holding that the Act does not apply to employees whose duties merely "affect" interstate commerce. The term "necessary" means more than merely convenient. *United States v. Atchison R. Co.*, 220 F. 215.

In the case of *Doyle v. Johnson Bros.* 28 N. Y. Sup. (2d) 452, 176 Misc. 656, it was held that a night watchman whose duties were to guard lumber in the lumber yard of his [fol. 66] employer, engaged in interstate commerce, and to open gates of the yard to permit passage of employer's trucks, and to act as fireman tending a furnace to keep the mill properly heated, was "engaged in production of goods for interstate commerce" within the meaning of this Act. Also, in the case of *Milan v. Texas Spring & Wheel Co.*, Tex. Civ. App. 1941, 157 S. W. (2d) 653, it was held that a night watchman guarding premises on which products sold in interstate commerce were manufactured, and occasionally taking telephone orders, and telephone calls after business hours for the man in charge of the employer's business and reporting them to him at his residence, is engaged in interstate commerce. Thus it will be seen that in all of the foregoing cases a recovery was permitted under the Act in favor of night watchmen, because they were engaged in other manual activities which were at least indirectly connected with production.

However, a recovery has been allowed in other cases on the ground that it was the duty of the night watchman to guard the materials, intended for interstate commerce, while stored on the yard, and when loaded in freight cars.

or otherwise awaiting shipment. *S. H. Robinson & Co. v. LaRue*, Tenn., 1941, 156 S. W. (2d) 432, affirming 156 S. W. 359. But none of the cases, *supra*, are controlling in the instant case, because the agreed statement of facts is entirely silent as to whether the duties of the employee, Fred Walton, related to guarding and protecting any goods assembled for manufacture or awaiting shipment in interstate commerce at the plant in question. Since it is agreed that he was employed only to enable the employer to obtain reduced insurance rates or premiums "upon the building, machiner-, and fixtures situated on said premises" we must assume, for the purpose of this decision, that his duties did not involve the guarding and protecting of the goods for [fol. 67] shipment in interstate commerce, as we are not warranted in enlarging upon the agreed statement of facts so as to include a factor not covered by such agreement.

In the case of *Abadie v. Cudahy Packing Co.*, 37 Fed. Supp. 164, the Court was dealing with a situation where a bookkeeper or ledger clerk was claiming the benefits of the Act, and Judge Borah, in rendering the opinion, said: "Even if it could be said that defendant was engaged in the production of goods for commerce because it 'handled or in any other manner worked on' the goods sold in interstate commerce it would not follow that plaintiff was employed in an occupation necessary to the production thereof as there is no causal relationship between his occupation and production. Plaintiff's occupation may have been necessary in respect to defendant's business but his duties as ledger clerk were not so closely related to production as can be considered necessary thereto."

The legislative history mentioned in *Jewel Tea Co. v. Williams*, *supra*, relating to the enactment of the Fair Labor Standards Act discloses that the conference draft of the bill, which was finally enacted into law after the Senate had refused to accede to the House amendment, which broadened the coverage of the bill by requiring time and a half for overtime for all employees of an "employer engaged in commerce in an industry affecting commerce," restored the test of coverage contained in the original Senate bill, and that Senator Pepper, of Florida, a member of the Conference Committee which prepared the Act as adopted, said, in answer to an objection to the broad scope of the Act, "I want it distinctly stated that this proposed law is not applicable to all employees of an industry which itself

is engaged in interstate commerce. It is applicable only to [fol. 68] those employees who themselves are engaged either in interstate commerce, or the production of goods for interstate commerce, and the contrary theory was definitely rejected by the Committee." 83 C. R. 9168 (Senate—75th. Cong., 3rd. Sess., June 14, 1938); also, *Jax Beer Co. v. Redfern*, 124 Fed. (2d) 172.

An examination of the decisions rendered by other courts in construing the Act has failed to reveal a case where the circumstances involved were such as to present the precise question now before us. Our search for a precedent among the reported cases has been at least interesting and entertaining, if not rewarding. For instance, it has been held that the benefits of the Act apply in favor of "Redcaps" employed at union terminal stations, *Pickett v. Union Terminal Co.*, D. C. Tex., 33 Fed. Supp. 244, reversed on other grounds, *Union Terminal Co. v. Pickett*, C. C. A. 118 F. (2d) 328; certiorari denied, 61 S. Ct. 1115, 313 U. S. 591, 85 L. Ed. 1546, vacated 62 S. Ct. 55, 86 L. Ed., certiorari granted, 62 S. Ct. 55, 86 L. Ed. — affirmed, 62 S. Ct. 659, 86 L. Ed. —; that by virtue of the constitutional power of Congress to regulate commerce among the states (section 8, sub-section 3, of the Federal Constitution) it may, under this Act regulate the business of an employer who is not himself engaged in interstate commerce, *Fleming v. Kirschbaum*, C. C. A. Pa., 124 Fed. (2d) 567, *Fleming v. Arsenal Bldg. Corp.*, 125 Fed. (2d) 278, affirmed in *Kirschbaum v. Walling*, 316 U. S. 517, 86 L. Ed. 1638, 62 S. Ct. 1116, wherein it was held contrary to the decision in *Killingbeck v. Garment Center Capitol*, 20 N. Y. S. (2d) 521 21 N. Y. S. (2d) 610, that elevator operators, and engineers, firemen, watchmen, etc., employed by an owner who leased his building to tenants, a number of whom manufactured goods which were shipped in interstate commerce, and in which business the owner of the building who employed these men had no interest, were engaged in the production of the goods for interstate commerce, on the ground that they furnished [fol. 69] light, heat, protection, etc., needed by the tenants in the production of such goods; also, in another case it was held that "interstate commerce" in oil which was sold by producer within the state, and shipped to a refinery therein, from which refined products were later sent outside the state, began when the crude oil first moved in the pores of the restraining sand stratum, and that hence a laborer

engaged in operating an oil rig was entitled to the benefits of the Act, since the refinery, although not his employer, would ultimately ship the refined products out of the state. *Devine v. Levy*, D. C. 39 F. Supp. 44, all contrary to the decision in *Crescent Cotton Oil Co. v. State of Miss.*, 257 U. S. 166, 66 L. Ed. 129, holding that manufacture is not commerce, and that the fact, of itself, that an article when in the process of manufacture, is intended for export to another state, does not render it an article of interstate commerce; also, in another case it is held that cooks at a boarding house near a logging camp preparing food to serve to crews of men producing goods in interstate commerce were likewise engaged in interstate commerce under this Act. *Warnack v. Consolidated Timber Co.*, D. C. Ore. 43 F. Supp. 625.

Then, too, our attention is also called to an Interpretative Bulletin, presumably prepared by a member of the legal staff of the Department of Labor, and which is a brief in behalf of the employee, even to the extent of contending that the burden of proof is upon the employer, when sued under the Act, to prove that the employee-plaintiff is not entitled to its benefits. And a few courts have held that such a bulletin is entitled to "great weight." We think it is entitled to the same thoughtful consideration that we have accorded to the brief of the employee's counsel at the bar in the instant case, although we find the bulletin less persuasive. While we would not presume to suggest a revised edition of this bulletin, it would seem that the case of *Warren-Bradshaw Drilling Co. v. Hall*, decided November 9, 1942, 317 U. S. —, 87 L. Ed. 99, would not be an inappropriate annotation thereto, wherein it was held that the burden of proof is upon the employee to show that he was engaged (1) in the production of goods, within the meaning of the Act, and (2) that such production was for interstate commerce.

This legislation has been held to be remedial and entitled to a liberal construction in favor of employees, nevertheless it is also true that as to some employers hiring laborers engaged in producing goods for interstate commerce, it is highly penal and discriminatory. For instance, section 216 (a) imposes a fine not exceeding \$10,000, or imprisonment for not more than six months, or both, upon an employer found guilty of violating the minimum wage and maximum hour provisions of the Act, and section 216 (b)

allows the time and a half for overtime, and an additional equal amount as "liquidated damages" for such violation (the designation as "liquidated damages" evidently being adopted for these penalties as a basis for conferring jurisdiction of suits to enforce the act upon all courts of competent jurisdiction in view of the then existing Federal statutes giving exclusive jurisdiction to the Federal courts of suits to enforce penalties prescribed by Federal laws), and then section 207 (b) provides that "no employer shall be deemed to have violated sub-section (a) by employing any employee for a work week in excess of that specified in such sub-section without paying the compensation for overtime employment prescribed therein if such employee is so employed in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board". That is to say the terms of the Act enables only such employers of labor engaged in producing goods for interstate commerce to escape the fine, imprisonment, compensation for overtime and liquidated damages imposed for [fol. 71] a violation thereof, as are willing to submit to the dictates of some labor agitator who is perchance more interested in collective dues than in obtaining the fruits of collective bargaining for the benefit of the man who toils.

However, the constitutionality of the Act was upheld in the case of *United States v. Darby*, 312 U. S. 100, 85 L. Ed. 609, 61 S. Ct. 451, 132 A. L. R. 1430, and *Opp Cotton Mills v. Administrator of Wage & Hour Division*, 312 F. S. 126, 85 Ed. 624, 61 S. Ct. 524, and the wanton waste of "plowing under" needed hours of labor during a period of manpower shortage in a great world crisis has until recently remained unhindered. Our problem is, therefore, to interpret and apply the provisions of the Act as written, but we are not inclined to expand their meaning by judicial construction any further than has already been done.

In the case of *Kirschbaum v. Walling*, 316 U. S. 517, 86 L. Ed. 1638, *supra*, the Court speaks of the term, engaged in any occupation necessary to the production of goods for interstate commerce as having to be construed "in the context of the history of federal absorption of governmental authority over industrial enterprise"; also, of "when the federal government takes over such local radiations in the vast network of our national economic enterprise, and thereby radically *readjusts the balance of state and na-*

tional authority"; and then speaks of the task of the Court in construing the Act as one of "accommodations as between assertions of *new federal authority and historic functions of the individual states*," and says that "the expansion of our industrial economy has inevitably been reflected in the extension of federal authority over economic enterprise and its *absorption of authority previously possessed by the states*." (Italics ours.) But, if it be assumed that the tenth article of the Amendments to the Constitution of the United States is still in good working order, wherein it provides that "the powers not delegated [fol. 72] to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people," one is prone to wonder from whence comes this "new" federal authority to "readjust the balance of state and national authority" and the right of "absorption of authority previously possessed by the states."

In the cases of *Fleming v. Kirschbaum Co.*, 124 Fed. (2) 567, supra; and *Fleming v. Arsenal Bldg. Corp.*, 125 Fed. (2d) 278, supra, affirmed by the United States Supreme Court in the case of *Kirschbaum v. Walling*, supra, the Court held that in the first of said cases, where the owner of the building employed an engineer, firemen, elevator operators, watchmen, porter, carpenter, and a carpenter's helper; and in the other case, where the owner employed the firemen, electrician, elevator operators, watchmen, and porters, who performed the customary duties of persons charged with the effective maintenance of the building, such employees were entitled to the benefits of the Act where the buildings, respectively, were leased for the most part by their employer to tenants engaged in interstate commerce, on the ground that, "The engineer and the fireman produce heat, hot water, and steam necessary to the manufacturing operations. They keep elevators, radiators, and fire sprinkler systems in repair. The electrician maintains the system which furnishes the tenants with light and power. The elevator operators run both the freight elevators which start and finish the interstate journeys of goods going from and coming to the tenants, and the passenger elevators which carry employees, customers, salesmen and visitors. The watchmen protect the building from fire and theft. The carpenters repair the halls and stairways and

other parts of the building commonly used by the tenants. The porters keep the buildings clean and habitable." It [fol. 73] would seem that if the electrician keeping the electrical appliances in repair was engaged in the production of goods for interstate commerce or in an occupation necessary to the production thereof because his services contributed to furnishing light to the tenants engaged in interstate commerce, then by the same token the employees of the power and light company generating the electricity would likewise be more directly engaged than he in the production of goods for interstate commerce; that by analogy those furnishing light and heat in the capitol building for the benefit and comfort of the judges are likewise engaged in the construction of this Fair Labor Standards Act; and it would also appear, as contended in the lower court by the defendant in the case of *Fleming v. Arsenal Bldg. Corp.*, supra, that the miller who furnishes the flour to a baker who sells bread in other states, the cutler who manufactures and sells knives to a wholesale butcher, the service station operator who repairs and fills a manufacturer's trucks, and the chemist who supplies alcohol to a perfumer, doing business in interstate commerce, would likewise be so engaged. In that case the lower court responded to this argument by merely saying, "We need not answer, for here no such dilemma presents itself." Of course, no logical answer to this argument could have been made. At any rate, we are of the opinion that to apply the Act to the employment of the night watchman in the case at bar, under the facts embodied in the agreement of counsel herein, would be to extend its benefits much further than has heretofore been done by any court, since the employees not engaged in the production of goods for interstate commerce who have been held, nevertheless, under previous decisions of the courts, to be engaged in an occupation necessary to the production thereof, and entitled to the benefits of the Act, were in each instance, almost without exception, at least on duty while such goods were being produced, or were employed specially to guard the goods while awaiting shipment. Even though we should be of the [fols. 74-85] opinion that such a liberal construction is justified, nevertheless, as an intermediate tribunal so far as final authority to construe the Act is concerned, we refrain from assuming the responsibility of further liberalization.

From what we have said it follows that we do not reach the other two questions involved.

The judgment of the lower court will be reversed, and judgment rendered here for the appellant.

REVERSED AND JUDGMENT HERE FOR THE APPELLANT

Smith, C. J., Dissents, being of the opinion that Fred Walton's employment by the appellant was within and covered by the provisions of the Fair Labor Standards Act of 1938: *Kirschbaum Co. v. Walling*, 316 U. S. 517, 86 L. Ed. 1638.

[File endorsement omitted.]

[fol. 86] SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION
FOR CERTIORARI

Upon Consideration of the application of counsel for the Petitioner,

It Is Ordered that the time for filing petition for certiorari in the above entitled cause be, and the same is hereby, extended to and including July 15th, 1943.

Hugo L. Black, Associate Justice of the Supreme
Court of the United States.

Dated this 10th day of June, 1943.

[fol. 87] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA
PAUPERIS—October 11, 1943

On Consideration of the motion for leave to proceed herein *in forma pauperis*,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

[fol. 88] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1943

The petition herein for a writ of certiorari to the Supreme Court of the State of Mississippi is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8752)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 159

MRS. EULA MAY WALTON, ADMINISTRATRIX OF THE
ESTATE OF FRED WALTON, DECEASED,

Petitioner,

VS.

SOUTHERN PACKAGE CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF
MISSISSIPPI.

BRIEF OF PETITIONER.

✓ CHAS. F. ENGLE,

Natchez, Mississippi,

Counsel for Petitioner.

BINGER & GIBSON,

Port Gibson, Mississippi,

Of Counsel.

INDEX.

SUBJECT INDEX.

	Page
I. Opinion of the court below	1
II. Statement of the case	1
III. Specification of errors	4
IV. Argument	4
Summary of argument	4
Point A	5
(A watchman having the duties of petitioner's decedent is covered by the Fair Labor Standards Act). Sec. 16(b).	
Point B.	15
(A suit for overtime compensation under Sec. 16(b) of the Fair Labor Standards Act will survive for the benefit of the injured employee's estate.)	
Point C.	20
(A suit for overtime compensation, liquidated damages, and attorney's fee under Sec. 16(b) of the Fair Labor Standard Act of 1938 is a remedial action. The Mississippi Statute of limitations for penalties does not apply.)	

TABLE OF CASES CITED.

<i>Abram v. San Joaquin Cotton Oil Co.</i> , 46 F. Supp. 969	21
<i>Berg v. Clouser</i> , 36 F. Supp. 168	21
<i>Bowie v. Gonzales</i> , 117 F. (2d) 11, 20 (C. C. A. 1)	13
<i>Bright v. Rowland</i> , 4 Miss. 398	22
<i>Campbell v. Superior Decalcomania Company</i> , 1 Wage & Hour Cases 347	12
<i>Cleveland Crane Company v. American Cast Iron Pipe Company</i> , 168 Ala. 250, 53 So. 313	22

<i>Coe v. Lykes Brothers</i> , 231 N. Y. 376, 143 N. E. 226	21
<i>Fleming v. Kirschbaum Company</i> , 38 F. Supp. 204, 4 Wage & Hour Rep. 171	12
<i>Hargrave v. Mid-Continent Petroleum Corporation</i> , 42 F. Supp. 908	12
<i>Hart v. Gregory</i> , 218 N. C. 184, 10 S. E. (2d) 644	11
<i>Huntington v. Attrill</i> , 146 U. S. 657, 13 S. Ct. 224	21
<i>Imperial Film Exchange v. General Film Co.</i> , 244 Fed. 985	16
<i>Kirschbaum Co. v. Walling and Arsenal Building Cor- poration v. Walling</i> , 316 U. S. 517, 62 S. Ct. 1116, 86 L. Ed. 1638	6, 10
<i>La Guardia v. Austin Bliss General Tire Co., Inc.</i> , 41 F. Supp. 678	19, 20, 21
<i>Larue v. S. H. Robinson & Company</i> , 156 S. E. (2d) 432	12
<i>Leffeyers v. General Export Iron and Metal Co.</i> , 38 F. Supp. 838	12
<i>McCulloch v. Maryland</i> , 4 Wheat. 315, 413	6
<i>Momand v. Twentieth Century Fox Film Corpora- tion</i> , 37 F. Supp. 649	15, 19
<i>Moore v. Backus</i> , 296 U. S. 640, 56 S. Ct. 173	16
<i>New Style Hat Mfg. Co.</i> , 4 Wage Hour Rep. 29	16
<i>Overnight Transportation Co. v. Missel</i> , 62 S. Ct. 1216	17, 20, 23
<i>Patton v. Brady</i> , 184 U. S. 608, 22 S. Ct. 493	16
<i>Robertson v. Argus Hosiery Mills</i> , 121 Fed. (2d) 285	21
<i>Shelton Electric Co. v. Victor Talking Machine Co.</i> , 277 Fed. 433, 435	22
<i>Southern Package Corporation v. Walton</i> , 11 So. (2d) 912	1
<i>Sullivan v. Associated Bill Posters</i> , 6 F. (2d) 100	16
<i>Townsend v. Boston M. R. R.</i> , 35 F. Supp. 938	21
<i>United States v. Bethlehem Steel Co.</i> , 205 U. S. 105, 27 S. Ct. 450	22
<i>United States v. Daniel</i> , 6 How. 11, 12 L. Ed. 323	16
<i>Wagner v. Gibbs</i> , 80 Miss. 53, 31 So. 434	18

TABLE OF STATUTES CITED.

	Page
Fair Labor Standards Act of 1938:	
Title 29, U. S. C. A., Sections 203(j), 206, 207, 216(b)	2, 4, 5
Title 29, U. S. C. A., Section 203(g)	14
Title 29, U. S. C. A., Sections 202(a) and 202(b)	22
Federal jurisdictional statute regarding penalties, 28 U. S. C. A., 271	22
Federal statute of limitations for penalties, 28 U. S. C. A. 791	22
Mississippi Code of 1930, Section 2301, Mississippi statute of limitations for penalties	3, 4, 5, 20, 23
Sherman Anti-Trust Act, 15 U. S. C. A.:	
Sec. 1 et seq.	18
Sec. 15	15, 19
Statute 4 Edw. III, c. 7	17

ENCYCLOPEDIAS AND ARTICLES CITED.

Private Litigation under the Wage & Hour Law, Rufus G. Poole, XIV Miss. L. J. 162-164	15
17 Corpus Juris 941	22

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 159

MRS. EULA MAY WALTON, AS ADMINISTRATRIX OF THE
ESTATE OF FRED WALTON, DECEASED,

vs.

Petitioner,

SOUTHERN PACKAGE CORPORATION,

Respondent.

BRIEF OF PETITIONER

I.

The Opinion of the Court Below.

The opinion in the Supreme Court of Mississippi is reported in 11 So. (2d) 912 and is set out in the Record,* pages 5-17.

II.

Statement of the Case.

Petitioner's decedent, Fred Walton, brought suit in the Circuit Court of Claiborne County, Mississippi, under the Fair Labor Standards Act of 1938 (52 Stat. at L. 1060,

* NOTE: All references herein to "Record, page —" have reference to the official printed Transcript of Record.

Title 29 U. S. C. A., Sections 203 (j), 206, 207, and 216 (b) for overtime compensation, liquidated damages, and attorney's fees (Record, page 3). After suit was filed and before judgment was rendered in the Circuit Court of Claiborne County, Mississippi, Fred Walton died. By order of said court, petitioner, the widow and duly appointed administratrix of his estate was substituted as plaintiff in this cause (Record, page 3). The Circuit Court of Claiborne County, Mississippi, rendered a judgment in her favor for the total sum of \$900.00: \$400.00 for back wages for overtime work, \$400.00 for liquidated damages, and \$100.00 for attorney's fees (Record, page 7). The Southern Package Corporation appealed to the Supreme Court of the State of Mississippi, and this judgment was reversed on appeal and judgment rendered for appellant-defendant on February 15, 1943, with Chief Justice Smith dissenting 11 So. (2d) 912; (Record, pages 5-17): This cause is now presented to this Honorable Court upon order allowing certiorari (Record, page 18).

The facts in this case are briefly stated as follows: The defendant in the lower court, Southern Package Corporation, was engaged in the manufacture of timber products in Claiborne County, Mississippi (Record, page 1). It employed the defendant as a night watchman from August 1, 1939, to April 1, 1940 (Record, page 1). It was admitted by defendant in the agreed statement of facts that a "substantial part of the products so manufactured by defendant are shipped outside the State of Mississippi," and that this corporation was engaged in the same business at the time it employed Fred Walton as a night watchman.

It was further admitted by the defendant corporation that: "It was the duty of said Walton, as night watchman at said plant, to make an hourly round of the plant and punch a night watchman's clock located at various stations

on said plant and to report any fires and trespassers" (Record, page 2). It, therefore, appears that Fred Walton had the usual duties of a night watchman in guarding and protecting respondent's plant, where timber products were manufactured for interstate commerce and where they awaited transportation. It was also admitted by the respondent that "if said Fred Walton was entitled to receive overtime, as provided for under the Fair Labor Standards Act (Title 29 U. S. C. A., Sections 201 to 216) that there would have accrued under the provisions of said Act an additional sum of \$400.00 for overtime" (Record, page 3). The defendant corporation, therefore, admitted that Fred Walton had not been paid in accordance with the provisions of the Fair Labor Standards Act of 1938; and, therefore, if his employment was covered by the Act, under the terms of the Act he should receive \$400.00 overtime compensation, \$400.00 liquidated damages, and a reasonable attorney's fee.

The respondent contended in the lower court that a night watchman is not entitled to the benefits of the Fair Labor Standards Act of 1938 when he is employed to guard and protect a plant where timber products are manufactured for interstate commerce; that an action of this nature for unpaid overtime compensation, liquidated damages, and attorney's fees is an action for a penalty and would not survive for the benefit of the deceased plaintiff's estate when the original plaintiff died after suit was brought; and that the Mississippi one-year statute of limitations for penalties and forfeitures, Section 2501, Mississippi Code of 1930, would apply to this action so as to bar an action for the employee's claim for overtime compensation. These matters were presented to the Mississippi Supreme Court for its decision in this cause (Record, pages 5-6).

III.

Specification of Errors.

1. The Mississippi Supreme Court erred in finding and holding that a night watchman whose duties were to guard and protect a timber manufacturing plant where products were manufactured for interstate commerce is not engaged in a "process or occupation necessary to the production of goods for commerce" and is not entitled to the benefits of the Fair Labor Standards Act of 1938, Title 29 U. S. C. A., Sections 203 (j), 206, 207, and 216 (b).

2. The Mississippi Supreme Court erred in not deciding that an employee's suit for overtime compensation, liquidated damages, and attorney's fees under Section 16(b) of the Fair Labor Standards Act of 1938 will survive for the benefit of his estate and can be maintained by his administratrix when the original employee-plaintiff dies after filing suit and before securing a judgment.

3. The Mississippi Supreme Court erred in not deciding that an employee's suit for overtime compensation, liquidated damages, and attorney's fees under Section 16 (b) of the Fair Labor Standards Act of 1938 is not a suit for a penalty, and that this action when originated in the Circuit Court of Claiborne County, Mississippi, is not governed by the Mississippi one-year statute of limitations for penalties and forfeitures (Section 2301, Mississippi Code of 1930).

IV.

ARGUMENT.**Summary.**

Point A. According to decisions of the United States Supreme Court and according to a logical interpretation of the Fair Labor Standards Act of 1938, a watchman whose

duties were to guard and protect a timber manufacturing plant where products were manufactured for interstate commerce is engaged in a "process or occupation necessary to the production of goods for commerce" and is entitled to the benefits of the Fair Labor Standards Act of 1938, Title 29 U. S. C. A., Sections 203 (j), 206, 207, and 216 (b).

Point B. Under a reasonable construction of the law applicable and in accordance with decisions of analogous cases an employee's suit for overtime compensation, liquidated damages, and attorney's fees under Section 16 (b) of the Fair Labor Standards Act of 1938 will survive for the benefit of his estate and can be maintained by his administratrix when the original employee-plaintiff dies after filing suit and before securing a judgment.

Point C. In accordance with the prior decision of the United States Supreme Court and in accordance with a reasonable and logical construction of the Fair Labor Standards Act of 1938, an employee's suit under Section 16 (b) of said Act for overtime compensation, liquidated damages and attorney's fees is not a suit for a penalty, and when an action of this kind is originated in a state court of the State of Mississippi, Section 2301 of the Mississippi Code of 1930, providing a one-year statute of limitations for actions brought to collect penalties or forfeitures, is not applicable.

POINT (A).

Under the facts of this case Fred Walton had been employed by respondent, Southern Package Corporation, as a night watchman, his duties being to guard and protect respondent's plant by making rounds of the plant and reporting fires and trespassers. The question here involved is whether an employee having the duties performed by

Fred Walton is entitled to the benefits of the Fair Labor Standards Act of 1938.

Under the terms of the Act, Section 3 (j), an employee is entitled to the benefits of the Act if he is engaged in any process or occupation necessary to the production of goods for interstate commerce. While the Act itself does not define the word "necessary"; it has been judicially defined by the Supreme Court of the United States in *McCulloch v. Maryland*, 4 Wheat. 315, 413. In that case Chief Justice Marshall defined the word as follows: "To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable." This definition of the word "necessary" has been applied in the construction of the Fair Labor Standards Act of 1938 and was adopted in the case of *Fleming v. Kirschbaum Company* (C. C. A. Pa.), 124 F. (2d) 567, a case involving the employment of watchmen, which case was later affirmed by the Supreme Court of the United States in the case of *Kirschbaum Co. v. Walling* (1942), 316 U. S. 517, 86 L. Ed. 1638.

The principles involved in this case are controlled by the cases of *Kirschbaum Co. v. Walling* and *Arsenal Building Corporation et al. v. Walling* (1942), 316 U. S. 517, 62 S. Ct. 116, 86 L. Ed. 1638, since these cases, which were decided together, are leading decisions of the United States Supreme Court involving the application of the Fair Labor Standards Act of 1938 to employment similar to that of Fred Walton.

A comparison of *Kirschbaum Co. v. Walling* and *Arsenal Building Corporation v. Walling*, 316 U. S. 517, 62 S. Ct. 116, 86 L. Ed. 1638, *supra*, and the instant case reveals the following similarity in facts:

In the cases of *Kirschbaum Co. v. Walling* and *Arsenal Building Corporation v. Walling*, *supra*, the United States

Supreme Court states the facts regarding the employers' occupation as follows: "The facts in the two cases differ only in minor detail. In No. 910, the petitioner owns and operates a six-story loft building in Philadelphia. The tenants are, for the most part, manufacturers of men's and boy's clothing. In No. 924, the petitioners own and operate a twenty-two story building located in the heart of the New York City clothing manufacturing district. Practically all of the tenants manufacture or buy and sell ladies' garments. Concededly, in both cases the tenants of the buildings are principally engaged in the production of goods for interstate commerce."

In the instant case the agreed statement of facts (Record, page 1) sets out the facts regarding the employer's occupation as follows: "(1) That the defendant is a corporation organized under the laws of the State of Delaware; and is engaged in operating a veneer plant at Port Gibson, Mississippi, at which plant it manufactures veneer from logs. That a substantial part of the products so manufactured by the defendant are shipped outside of the State of Mississippi."

The case of *Kirschbaum v. Walling*, *supra*, like the instant case involved the employment of men acting as watchmen. In setting forth their duties the United States Supreme Court says that they performed the customary duties of such employees and states their duties as follows: "The watchmen protect the buildings from fire and theft." That Fred Walton had the same duties as these employees is set out in the agreed statements of facts (Record, page 2): "It was the duty of said Walton, as night watchman at said plant, to make an hourly round of the plant and punch a night watchman's clock located at various stations on said plant and to report fires and trespassers."

Since the facts in these two cases decided by the Supreme Court of the United States are similar in all impor-

tant respects to the instant case, it would appear that the same legal principles would be applicable. In the decision of the United States Supreme Court it was held that the watchmen were entitled to the benefits of the Fair Labor Standards Act. The opinion delivered by Mr. Justice Frankfurter interprets the Act as follows: "The normal and spontaneous meaning of the language by which Congress defined in Sec. 3 (j), 29 U. S. C. A., Sec. 203 (j), the class of persons within the benefits of the Act, to-wit: employees engaged 'in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof' encompasses these employees, in view of their relation to the conceded production of goods for commerce by the tenants. * * * Nor can we find in the Act, as do the petitioners any requirement that employees must themselves participate in the physical process of the making of the goods before they can be regarded as engaged in their production. Such a construction erases the final clause of Sec. 3 (j) which includes employees engaged 'in any process or occupation necessary to the production' and does not limit the scope of the statute to the preceding clause which deals with employees 'in any other manner working on such goods.' "

The employers in the cases of *Kirschbaum Company v. Walling* and *Arsenal Building Corporation v. Walling*, *supra*, were the owners of buildings leased to tenants engaged in the production of goods for interstate commerce. Under the facts of *Kirschbaum Company v. Walling*, it would appear that the reason of the employer for hiring the watchmen was to induce tenants to rent their premises and to protect their buildings. However, under the terms of the Fair Labor Standards Act the character of the work done by the employee and not the employer's reason for employing him determines whether or not his employ-

ment is covered by the Act. The Supreme Court of the United States came to this logical and reasonable conclusion in the decision of the two cases cited above. Therefore, if in the instant case the employer hired Fred Walton partly to reduce insurance rates, this factor has nothing to do with the application of the Fair Labor Standards Act which depends on the character of the work performed by the employee. It is admitted by respondent in the agreed statement of facts (Record, page 2) that the duties of Fred Walton were making rounds of inspection of the respondent's plant and guarding and protecting it by reporting fires and trespassers. If the employee was in fact engaged in "any process or occupation necessary to the production" of goods for interstate commerce, he is entitled to the benefits of the Act regardless of his employer's reason for hiring him. The fact that one of the employer's reasons for employing Walton was to reduce insurance rates is of no consequence in determining whether or not he is entitled to the benefits of the Act, except that it would seem that the attitude of respondent's insurance company in requiring the employment of a night watchman in its contract with respondent is an indication that the duties of such a watchman were necessary.

The respondent, Southern Package Corporation attached great significance to the fact that in the agreed statement of facts in this case it is stated that Fred Walton was not engaged in the manual and physical process of making or manufacturing the goods for interstate commerce. The duties of the watchmen in this case and in the cases of *Kirschbaum Company v. Walling*, *supra*, were the same: guarding and protecting the plants and reporting fires and trespassers. The United States Supreme Court in the case of *Kirschbaum Company v. Walling*, *supra*, held that other duties were unnecessary in order to entitle the employee to the benefits of the Act and that the statute

could not be construed as meaning that the employee must be engaged in the physical process of making the goods in order to be covered by the Act since the Act itself has specifically provided otherwise.

The Supreme Court of Mississippi commented at length upon this decision of the United States Supreme Court (Record, pages 14-16), and in this discussion it apparently views the entire Fair Labor Standards Act with disapproval. (Record, pages 13-16) It says: "the constitutionality of the Act was upheld in the case of *United States v. Darby*, 312 U. S. 100, * * * and the wanton waste of 'plowing under' needed hours of labor during a period of manpower shortage in a great world crisis has until recently remained unhindered." It will be noted that this suit was brought long before our nation declared war, so apparently this statement of the Mississippi Supreme Court is not made because it feels that the provisions of the Act should be relaxed in an emergency but because it believes the Act should have never been enacted. The comments of the Mississippi Supreme Court upon the case of *Kirschbaum Company v. Walling*, *supra*, show that the state Supreme Court regards the Fair Labor Standards Act of 1938 with disfavor. (Record 14-16).

Although it devoted a great deal of space to a discussion of the decision of the United States Supreme Court, the Mississippi State Supreme Court neglected to point out the distinction between these cases decided by the United States Supreme Court and the instant case. Chief Justice Smith of the Mississippi Supreme Court realized that this decision of the United States Supreme Court was directly in point in a consideration of this case and dissented, "being of the opinion that Fred Walton's employment by the appellant was within and covered by the provisions of the Fair Labor Standards Act of 1938. *Kirschbaum Co. v. Walling*, 316 U. S. 517, 86 L. Ed. 1638." (Record, page 17.)

The Mississippi Supreme Court in its majority opinion apparently interpreted the Act differently from the United States Supreme Court and instead followed a decision of the North Carolina Supreme Court, *Hart v. Gregory*, 218 N. C. 184, 10 S. E. (2d) 644, 130 A. L. R. 265 (Record, page 8). This decision of the North Carolina Supreme Court was rendered in October, 1941, prior to the decision of *Kirschbaum Company v. Walling*, *supra*, and allowed a watchman a recovery due to the fact that he also kept the boilers filled up at night. The North Carolina Court implied that a watchman ordinarily would not be covered by the Act. It is hard to reconcile this decision with logic as it would be difficult to distinguish the duty of filling boilers from the other duties of a watchman. It would appear that a watchman who prevented fires or trespassers from destroying the boiler would be performing as valuable a task to production as one who kept the boiler from burning dry by filling it. However, the Supreme Court of North Carolina seems to be the only court that has ever attached any great significance to this distinction, and its decision was with a divided court. Justice Seawell dissenting. Furthermore, at the time of this decision the North Carolina court did not have the benefit of a decision of the United States Supreme Court directly in point to guide it in the construction of this Act.

The Supreme Court of Mississippi appeared to accept the theory that the watchman must be engaged in "other manual activities" (Record, page 10) in order to be entitled to the benefits of the Act. It is difficult to see where such a requirement is made in the Act or implied by its terms. Could it logically be said that a watchman who guards and protects his employers plant and reports fires and trespassers is not covered by the Fair Labor Standards Act, but if he occasionally answers the telephone after business hours, he is entitled to all its benefits? (Opinion of Mississippi Supreme Court, Record, page 10). The United

States Supreme Court in the case of *Kirschbaum v. Walling*, supra, did not draw such a distinction but decided that the watchmen were entitled to the benefits of the Act because as watchmen guarding and protecting the buildings, they were performing services necessary to interstate commerce. The Mississippi Supreme Court also attempts to distinguish the instant case from cases where the watchman is employed only "to guard the goods while awaiting shipment" and indicates that in the latter cases the watchman is entitled to the benefits of the Act (Record, page 16). It would appear that a watchman who guarded and protected the plant where the goods were manufactured for interstate commerce and where the products would necessarily be kept while awaiting shipment would be even more closely connected with the production of goods for interstate commerce than one who merely watched the products. In the *Kirschbaum* case, the watchman were employees of the owner of the building, and coverage in this decision was based on the theory that "maintenance of a safe, habitable building is indispensable to" the production of goods for interstate commerce. 316 U. S., at 524. The logic of this decision is obvious from the phraseology of the Act.

It further appears that there are great numbers of decisions which are based on the same reasoning employed in the decision of *Kirschbaum Company v. Walling*, supra, and the great weight of lower court decisions are in accord. *Fleming v. A. B. Kirschbaum Company* (D. C. E. D. Pa.) (1941), 4 Wage & Hour Rep., page 171; *Joe Lohr v. S. H. Robinson & Company, Inc.*, 156 S. E. (2d) 432, affirming 156 S. W. (2d) 359; *Lefevers v. General Export Iron and Metal Company*, D. C. S. D. Texas (Corpus Christi Div.) (1940), 38 F. Supp. 838; *Hargrave v. Mid-Continent Petroleum Corporation* (E. D. Okla.), 42 Fed. Supp. 908 (1941); *W. L. Campbell v. Superior Decalcomania Company, Inc.* (D. C. N. D. Tex., Dallas Div.) (1940), 1 Wage & Hour Cases 347.

The respondent in the lower courts cited numerous cases which it claimed were authorities to the effect that a watchman is not entitled to the benefits of the Fair Labor Standards Act. However, in petitioner's opinion they are not in point in a consideration of this case for one or the other of two reasons: (1) They involved watchmen who were *employed by retail businesses*, or (2) they involved employees who were *not employed as watchmen* but were engaged in some other line of work less important and only remotely connected with production.

It does not appear that the Supreme Court of Mississippi ever pointed out a factual difference between the cases decided by the United States Supreme Court and the instant case. The State Supreme Court did comment on the fact that the plant where Walton worked did not operate regularly at night, which is usually the case with most manufacturing plants of that kind under ordinary circumstances. In its opinion (Record, page 9) the Supreme Court of Mississippi says: "Presumably the night watchman slept during the day-time; while the other employees were engaged in the production of goods for commerce. He contributed nothing to such work or production. * * *". In the same paragraph the Court says: "If the plant had been running at night, the services of a night watchman would not have been required at all, even to satisfy the request of the insurance company." The Mississippi Supreme Court seems to say that since certain manufacturing operations are discontinued at the plant during the night, a night watchman is not an employee necessary to production; and yet because of this very fact he is "required". The State Supreme Court refers to the fact that the goods were not regularly manufactured at night again in the conclusion of its opinion. It is petitioner's opinion that this fact is the very reason that a watchman was necessary for production since he protected the plant from damage or loss while other employees slept. In *Bowie v. Gonzales*, 117

F. (2d) 11, 20 (C. C. A. 1) employees engaged in repair and maintenance of sugar mills in the dead season were held covered. The respondent apparently accords significance to the fact that the employee in this case agreed to work for respondent for much less than the wage provided for by the Fair Labor Standards Act, and the Mississippi Supreme Court also commented on this fact. It will be noted that Fred Walton's employment was before the War when employment was much scarcer than at the present time. It is conceded that an employee in poor economic condition might be driven by dire necessity to accept employment for less than a decent living wage to prevent worse suffering in his family. However, the provisions of the Act itself (Section 3(g)) expressly prevent a defendant from setting up such an unreasonable defense.

Any contention that the benefits of the Act do not extend to an employee unless he is engaged in the "actual production" of goods, unless he is manually and physically making the product would only show a desperate attempt to escape liability by taking refuge in flimsy technicalities of no reasonable significance. As was stated by this Court in the case of *Kirschbaum Company v. Walling, supra*, the final clause of Section 3(j) of the Fair Labor Standards Act "can not thus be read out of the Act;" nor can it be said by respondent that Walton's duties were not necessary to the production of goods for interstate commerce since it is admitted that he watched over respondent's manufacturing plant, made regular rounds, and protected it from loss or destruction by fires or thieves.

From a direct reference to the Fair Labor Standards Act of 1938, Section 3(j), the logic of the decision of the United States Supreme Court is apparent. The final clause of Section 3(j) states that an employee engaged "in any process or occupation necessary to the production" of goods for interstate commerce is entitled to the benefits

of the Act. Certainly it would seem that a watchman who protects a timber manufacturing plant from destruction by fires and trespassers is necessary to production and like the watchman in the case of *Kirschbaum Company v. Walling*, *supra*, who had identical duties, his employment is covered by the Fair Labor Standards Act of 1938. It is, therefore, respectfully submitted that the decision of the Supreme Court of Mississippi in the instant case is not in accord with the decisions of this Honorable Court and a logical interpretation of the Act itself.

POINT (B).

From reference to similar cases regarding the survival of actions it appears that an action for back wages for overtime work, liquidated damages, and reasonable attorney's fees as provided by the Fair Labor Standards Act of 1938 would survive the death of the employee for the benefit of his estate.

As the plaintiff's estate was diminished and the defendant unlawfully enriched by its illegally holding amounts due the deceased plaintiff, it would appear that there is some analogy between this case and actions under the Sherman Anti-Trust Act, 15 U. S. C. A., Sec. 15, wherein Federal Courts have held that the cause of action would survive. *Momand v. Twentieth-Century Fox Film Corporation*, W. D. Okla., 37 F. Supp. 649 (1941).

There is an interesting discussion of the survival of the action under Section 16(b) contained in XIV Mississippi Law Journal, pages 157 *et seq.*, under the caption "Private Litigation Under the Wage and Hour Act", by Rufus G. Poole, Assistant Solicitor, in charge of opinions and reviews, United States Department of Labor. This article summarized the cases regarding survival and pointed out that since actions under the Anti-Trust Law are held to survive, an action under Section 16(b) of the Fair Labor

Standards Act would logically survive on the same principle. The discussion refers to the following cases:

“In *Sullivan v. Associated Bill Posters*, (6 F. (2d) 100), an action for triple damages under the Anti-Trust Act was held to survive against the estate of the deceased wrongdoers; and in *Moore v. Backus* (78 F. (2d) 571) (C. C. A. 7th 1935), cert. denied, 296 U. S. 640, 56 Sup. Ct. 173, 80 L. Ed. 456 (1936)) a similar action was held to survive in favor of the estate of the deceased plaintiff. The rule is apparently the same where the ‘deceased party’ is a dissolved corporation. (*Imperial Film Exchange v. General Film Co.*, 244 Fed. 985, 986 (S. D. N. Y. 1915)). These cases proceed upon the theory that the action for triple damages is an action for injury to the plaintiff’s property as a result of an illegal conspiracy; and that while such an action sounds in tort, it survives and may be pursued against the estate of a deceased person because the property or the proceeds or value of the property belonging to the plaintiff have been appropriated by the deceased person and added to his own estate or money. (*Imperial Film Exchange v. General Film Co.*, 244 Fed. 985, 986 (S. D. N. Y. 1915) (As to the claim of an employee for back wages alleged to be due him by his bankrupt employer, see *In re New Style Hat Mfg. Co.*, 4 Wage Hour Rep. 29 (N. D. Ohio 1940)) (*United States v. Daniel*, 6 How. 11, 12 L. Ed. 323 (U. S. 1848); *Ratton v. Brady*, 184 U. S. 608, 22 Sup. Ct. 493, 46 L. Ed. 713 (1901); *Sullivan v. Associated Bill Posters*, 6 F. (2d) 1000 (C. C. A. 2d, 1925); *Moore v. Backus*, 78 F. (2d) 571 (C. C. A. 7th, 1935) cert. denied, 296 U. S. 640, 56 Sup. Ct. 173, 80 L. Ed. 455 (1936). This exception, as originally stated in the Statute of Edward III, covered only the death of the injured party. However, judicial decisions have extended its application to cases where the defendant wrongdoer is the deceased; provided,

always, that the wrongful act resulted in both a decrease in the estate of the injured party and an increase in that of the wrongdoer.”

From the cases cited above it appears that the Act survives or not according to the principles of common law of which the Statute of Edward III is regarded as a part. The statute 4 Edw. III, c. 7, permitted executors to maintain action of trespass for chattels taken and carried away in the life time of the testator, but did not cover cases involving the death of the defendant. If the injury giving rise to the right affected the property of the decedent, the tort action will survive, *Moore v. Backus, supra*, and judicial decisions have extended the application of the Statute of Edward III to cases where the defendant wrongdoer is the deceased, so long as the wrongful act resulted in a decrease in the estate of the injured party and an increase in that of the wrongdoer. *Sullivan v. Associated Bill Posters, supra*. Since there is absolutely no reason in logic or justice why a defendant should be allowed to escape liability and enjoy the proceeds of his wrongdoing while the estate of the injured decedent bore the loss, there is small wonder that as far back as the enactment of 4 Edw. III, c. 7, it was found necessary to prevent such injustice by the enactment of this statute which has been incorporated into the common law.

While actions under Section 16(b) of the Fair Labor Standards Act are remedial and not penal, *Overnight Motor Transportation Company v. Missel, Md.*, 62 Sup. Ct. 1216 (1942), it is interesting to note that the Mississippi Supreme Court held that an administrator could sue and recover punitive damages against a wrongdoer:

“Punitive damages are inflicted for the purpose of deterring a culprit in the future, and the imposition of them for such purpose is impossible in the case of a person

deceased. But where the trespasser is still alive, as in the case at bar, there is no reason whatever why he should be exonerated because of the death of the one on whom he has committed a trespass; for the punishment is imposed not to deter him from repeating his trespass as against the particular party assailed or injured, but to secure his general good behavior." *Wagner v. Gibbs*, 80 Miss. 53, 31 So. 434, 92 Am. St. Rep. 598. The reasonableness of this decision is obvious.

The Anti-Trust Act makes no specific provision for survival of actions, but the authorities under which this act has been held to survive are numerous and their reasonableness is apparent. Under the rule set out in the cases decided under the Anti-Trust Act cited above, it appears that a defendant can not dodge liability imposed by a law simply because the injured party died. It would certainly seem that if the Anti-Trust Act, 26 Stat. 209 (1890, 50 Stat. 693 (1937), 15 U. S. C. A., Sec. 1, et seq. (1941) providing for triple damages for injury to the plaintiff's property, as a result of an illegal conspiracy, is held to survive, then this action under Section 16(b) of the Fair Labor Standards Act of 1938 for back wages for overtime work and for liquidated damages would also survive on the same theory. It appears from the agreed statement of facts (Record, page 3) that Walton was paid nothing for a considerable amount of overtime work. By appropriating Walton's \$400.00 and the amount of his liquidated damages the respondent is still profiting by the loss sustained by Walton and his estate. In the instant case the amount due the employee's estate for uncompensated services and the loss to his estate is more easily determinable and the injury to the property of the deceased employee is more obvious than in the suits under the Anti-Trust Act. That the respondent's estate is illegally enriched by the amount now due the deceased employee's estate, which accrued to the employee prior to

his death, is also apparent. It is believed by petitioner that this cause of action should survive under the same theory that actions under the Sherman Anti-Trust Act have been held to survive.

In regard to whether an action under Section 16(b) of the Fair Standards Act of 1938 will survive for the benefit of the employee's legal representative, two cases are of interest: *Momand v. Twentieth-Century Fox Film Corporation et al.* and *Same v. Griffith Amusement Co.* (W. D. Okla.) 37 F. Supp. 649 (1941); and *La Guardia v. Austin-Bliss General Tire Co., Inc.* (S. D. N. Y.) 44 F. Supp. 678 (1941).

Momand v. Twentieth-Century Fox Film Corporation, supra, was a suit under Section 7 of the Sherman Anti-Trust Act, 15 U. S. C. A., Sec. 15. The defendants contended that the alleged cause of action sounded in tort and that plaintiff could not maintain the suits as an assignee because Oklahoma law forbids the assignment of a cause of action for a tort. The court held that this action to recover treble damages for violation of the anti-trust laws by a combination and agreement injuring plaintiff's assignors in their business and property was not barred by this Oklahoma statute forbidding the assignment of causes of action for torts. The court in this case also said: "The right of action created by Section 7 of the Sherman Anti-Trust Act, is not a penalty but remedial, and the remedy granted is to one injured in his business or property by reason of the acts forbidden in the preceding sections of the Act." The court in this case also states that this cause of action under the Sherman Anti-Trust Act would survive for the benefit of the legal representative of the injured person. It says: "Assignability and survivability are convertible terms and, for the purpose of considering the applicable law, cases involving survivorship are applicable." It would, therefore, appear that if a cause of action was

assignable, it would likewise survive and could be maintained by an executor or administrator. *La Guardia v. Austin-Bliss General Tire Co., Inc.*, 41 F. Supp. 678, *supra*, specifically held that an assignee of employees' claims under the Fair Labor Standards Act for unpaid overtime compensation may maintain action therefor. Since assignability and survivability are determined by similar factors, *Momand v. Twentieth-Century Fox Film Corporation*, *supra*, it would seem logical to conclude that the action under the Fair Labor Standards Act would also survive for the benefit of the deceased employee's estate.

POINT (C).

It appears from numerous judicial authorities that Section 2301, Mississippi Code of 1930, the state one-year statute of limitations for actions for penalties and forfeitures, does not apply to Section 16(b) of the Fair Labor Standards Act of 1938, providing an action for overtime compensation, liquidated damages, and a reasonable attorney's fee.

The Mississippi Supreme Court in its decision of the instant case (Record, pages 13-14) states that the liquidated damages provided for in section 16(b) of the Fair Labor Standards Act is a penalty. It would seem that this opinion is also not in accord with decisions of this Court, since the Supreme Court of the United States held that an action under this provision of the Fair Labor Standards Act of 1938 is not a suit for a penalty and that the additional equal amount is liquidated damages in the recent decision of *Overnight Motor Transportation Company vs. Missel*, 62 Sup. Ct. 1216 (1942).

In this case respondent, Missel, was an employee of the petitioner, Overnight Motor Transportation Company, a corporation engaged in interstate motor transportation as a common-carrier. He acted as a rate clerk for this corporation. Respondent brought a statutory action to

recover unpaid overtime compensation, an additional equal amount as liquidated damages, and counsel's fee under the Fair Labor Standards Act of 1938. In holding that the act was demedial, Mr. Justice Reed, who delivered the opinion of the court said:

"The liquidated damages for failure to pay minimum wages under Section 6(a) and 7(a) are compensation, not a penalty or punishment by the Government. Cf. Huntington v. Atrill, 146 U. S. 657, 667, 668, 674, 681, 13 S. Ct. 224, 227, 228, 230, 233, 36 L. Ed. 1123; Cox v. Lykes Brothers, 231 N. Y. 376, 143 N. E. 226. The retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages." (Italics supplied). In the footnote to this decision a great number of authorities are cited in support of this opinion of the United States Supreme Court.

In the case of *La Guardia v. Austin-Bliss General Tire Co.* (S. D. N. Y.) 41 F. Supp. 678 (1941), the Court said: "The recovery of liquidated damages is not by way of penalty but is additional compensation to the employees for being illegally deprived of their overtime. *Robertson v. Argus Hosiery Mills, supra*, (121 Fed. (2d) 285); *Townsend v. Boston & M. R. R., supra*, (35 F. Supp. 938); *Berget v. Thouser, supra* (36 F. Supp. 168); *Hargrave v. Mid-Continent Petroleum Corp., D. C.* 36 F. Supp. 233."

The recent case of *Abram et al. v. San Joaquin Cotton Oil Co.* 46 F. Supp. 969 (1942) is a case discussing what statute of limitations is applicable to Section 16(b) of the Fair Labor Standards Act. The court held that the liquidated damages recoverable from the employer under the Fair Labor Standards Act by an employee entitled to recover overtime compensation do not amount to a "penalty" within the California one-year statute of limitations:

A provision is more readily construed as being for liquidated damages and not as being a penalty when it would be difficult to measure or ascertain actual damages. *F. S.*

v. *Bethlehem Steel Co.*, 205 U. S. 105, 27 S. Ct. 450, 51 L. Ed. 731; *Cleveland Crane etc., Co. v. American Cast Iron Pipe Co.*, 168 Ala. 250, 53 So. 313; *Bright v. Rowland*, 4 Miss. 398; 17 C. J. 941. In the enactment of the Fair Labor Standards Act, the United States Legislature realized that it would be impossible to assess the exact extent of a working man's injury by not receiving his wages at the time when he was first entitled to them and for working overtime without adequate compensation at the time for this extra work and effort; therefore, it was provided for the employee to have an amount equal to his recovery for back wages as liquidated damages. This was a reasonable provision since the more back wages a plaintiff is entitled to the more he has been damaged by not receiving his pay at the proper time. In the case of *Shelton Electric Company v. Victor Talking Machine Company*, 277 Fed. 433, 435, the Court said in discussing a problem somewhat similar to the one in the instant case: "The treble damages, which the complainant seeks to recover, are neither a penalty or a forfeiture, but merely treble damages allowed by law for the redress of a private injury."

The Federal jurisdictional statute, 28 U. S. C. A. Sec. 371, makes the provision that suits for penalties under federal statutes should be brought in federal courts. If the United States legislature had regarded this Act as penal in its nature, it would not have dedicated to the state courts the power to enforce it. If this suit were a suit for a penalty, suit would be brought in a federal court and the federal five-year statute of limitations would apply. 28 U. S. C. A. 791. The remedial nature of the act is emphasized in the "Finding and Declaration of Policy" contained in the Act itself. Secs. 2(a) and (b).

It is therefore, respectfully urged, that the decision of the Mississippi Supreme Court in this case was not in accord with applicable decisions of this Court since the State

Supreme Court apparently arrived at the conclusion that the liquidated damages provided by the Fair Labor Standards Act were penalties. It appears that the United States Supreme Court in the case of *Overnight Motor Transportation Company vs. Missel*, 62 S. Ct. 1216, supra and great numbers of lower court decisions have held that Section 16(b) of the Fair Labor Standards Act is not penal but is a remedial provision for compensation, and it seems clear that this is the interpretation of the Act the lawmakers intended. It is petitioner's belief that this point should have been decided in accordance with the authorities cited above and that the Supreme Court of Mississippi should have held that this action is under a remedial statute, and that, therefore, the Mississippi one-year statute of limitations for actions for "penalties and forfeitures", Section 2301, Mississippi Code of 1930, has no application to this suit and petitioner's action is not barred thereby. It would appear from the authorities cited above that petitioner is entitled to recover \$400.00 as back wages for overtime work, \$400.00 as liquidated damages, and a reasonable attorney's fee.

It is, therefore, respectfully submitted that judgment of the Mississippi Supreme Court should be reviewed by this Honorable Court and finally reversed.

CHAS. F. ENGLE,

Natchez, Mississippi,

Counsel for Petitioner.

BERGER & GHOLSON,

By CARLTHERS GHOLSON,

Port Gibson, Mississippi,

of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 159.

MRS. EULA MAY WALTON, ADMINISTRATRIX OF
THE ESTATE OF FRED WALTON, DECEASED,
PETITIONER,

VS.

SOUTHERN PACKAGE CORPORATION,
RESPONDENT.

**BRIEF FOR RESPONDENT IN OPPOSITION TO
MOTION OF PETITIONER FOR LEAVE TO
PROCEED IN FORMA PAUPERIS**

and

**BRIEF FOR RESPONDENT IN OPPOSITION TO
PETITION FOR CERTIORARI.**

W. S. HENLEY,
W. H. WATKINS,
P. H. EAGER, JR.,
THOS. H. WATKINS,

Attorneys for Respondent.

HENLEY, JONES & WOODLIFF,
Hazlehurst, Mississippi,

WATKINS & EAGER,
Jackson, Mississippi,

Of Counsel for Respondent.

INDEX

Brief on Behalf of Respondent in Opposition to Motion of Petitioner for Leave to Proceed in Forma Pauperis	1
Brief for Respondent in Opposition to Petition for Certiorari—	
Point I. The petitioner was not engaged in an occupation necessary to the production of goods for commerce within the Fair Labor Standards Act, or not engaged in the "production of goods for commerce"	7
Statement	7
Argument	8
Point II. Cause of action did not survive	19
A. The Federal statute does not provide for survival of suit under the Wage and Hour Law	19
B. Assuming the Federal statute to be silent as to survival, the common law as it existed at the time of its adoption in America would control	20
C. This cause of action arises out of an alleged tort and is not a suit for breach of a contract	21
D. Cause of action does not survive under common law	22
E. Cause of action does not survive under Mississippi decisions	26
Point III. Action is barred by one-year statute of limitations	27
Certificate	35

TABLE OF CASES

Adair vs. Traco Division, 192 Ga. 59, 14 S. E. 2d 466	32
Anderson vs. Meacham, 62 Ga. App. 145, 8 S. E. 2d 459	33
Ansel Higgins vs. Carr Brothers Company, 87 L. Ed. (Advance Sheets) 398	16

Arsenal Building Corporation vs. Walling, 125 F. 2d 207	11, 12
Austin vs. United States, (D. C. Ill.) 40 Fed. Supp. 777	4
Bayless vs. Johnston, 127 F. 2d 531	5
Boggan vs. Provident Life & Accident Ins. Co. of Chattanooga, Tenn., (C. C. A. 5) 79 F. 2d 721	2, 3
Brown vs. Bailey, 177 Tenn. 185, 145 S. W. 2d 105	18
Brown vs. Carter Drilling Co., 38 Fed. Supp. 489	18
Bowman vs. Pace Company, 119 F. 2d 858	18
Carter vs. Kurn, (C. C. A. 8) 120 F. 2d 261	2
Catchings vs. Hartman, 178 Miss. 672, 174 So. 553	26, 27
Chetkovich vs. U. S., (C. C. A. 9) 47 Fed. 894	2, 4
Cline vs. Super-Cold S. W. Co., (U. S. D. C. N. Texas, 1941) 1 W. H. Cases 777	27
Cole vs. Harker, (W. D. Tenn.)	21
Collins vs. Hancock, (La. First Judicial District Court, 1941) 1 W. H. Cases 1117	28
De Groot vs. United States, (C. C. A., Alaska) 88 F. 2d 624	5
De Maurey vs. Swope, 100 F. 2d 530	4
Dotson vs. Stowers, 37 Fed. Supp. 937	18
Duncan vs. Montgomery Ward & Co., Inc., (U. S. D. C. S. Texas, 1941) 42 Fed. Supp. 879	27, 28
Erie vs. Tompkins, 304 U. S., p. 64, 82 L. Ed., p. 1188	20
Fisher vs. Cushman, (C. C. A., Wash.) 99 F. 2d 918	5
Fleming vs. A. B. Kirschbaum Company, 38 Fed. Supp. 204	11, 12
Hart vs. Gregory, 220 N. C. 180, 16 S. E. 837	18
Henshaw vs. Miller, 58 U. S. 211, 15 L. Ed. 222	25
Johnson vs. Nickoloff, 52 F. 2d 1074	4
Kelly vs. Johnston, (C. C. A., Cal.) 99 F. 2d 582	5
Kirschbaum vs. Walling, 316 U. S. 517, 86 L. Ed. 1638	11
Klotz vs. Ippolito, (U. S. D. C. S. Texas, 1941) 40 Fed. Supp. 422	27
Littleton vs. White Motor Company, (U. S. D. C. N. Texas, 1941) 1 W. H. Cases 914	27

INDEX

III

McLeod vs. Threlkeld, decided June 7th, 1943	17
McNeely vs. City of Natchez, 148 Miss. 268, 114 So. 484	26
Mengel Co. vs. Ishee, 4 So. 2d 878	30
Moore vs. Backus, 78 F. 2d 571 (573)	22
Overstreet vs. North Shore Corporation, (Advance Sheets) 87 L. Ed. 423	17
Owen vs. Liquid Carbonic Corporation, (U. S. D. C. S. Texas, 1941) 42 Fed. Supp. 774	28
Pederson vs. Delaware, L. & W. R. R. Co., 229 U. S. 146, 57 L. Ed. 1125, 33 S. Ct. 648	17
Reed vs. Pennsylvania Company, (C. C. A. 6) 111 Fed. 714	2
Rogers vs. Glazer, 32 Fed. Supp. 990	18
Schrieber vs. Sharpless, 28 L. Ed. 65	21
Smith vs. Johnston, 109 F. 2d 152	5
Southern Package Corporation vs. Walton, 11 So. 2d 912	8
State for Use of Rogers vs. Newton, 191 Miss. 611, 3 So. 2d 816	28, 31
Stewart vs. St. Sure, (C. C. A. Cal.) 109 F. 2d 162, certiorari denied 309 U. S. 653, 60 S. Ct. 470, 84 L. Ed. 1003, rehearing denied 309 U. S. 696, 60 S. Ct. 588, 84 L. Ed. 1036	4
St. John vs. Brown et al., (N. D. Texas, Fort Worth Division, March 28, 1941) 38 Fed. Supp. 385	22
Stringer vs. Griffin Grocery Co., (Tex. Ct. Civ. App.) 149 S. W. 2d 158	31
Sullivan vs. Associated Bill Posters, etc., 6 F. 2d 1000 (1004, 1007, 1012)	23, 26
Swift vs. Tyson, 16 Peters, p. 1, 10 L. Ed. 856	20
Terner vs. Clickstein & Terner, Inc., 283 N. Y. 299, 28 N. E. 2d 846 (N. Y., 1940)	21
United States vs. Railroad Co., 220 Fed. 215	18
Volk vs. B. F. Sturtevant Co., 99 Fed. 532, affirmed 104 Fed. 276	4
Walling vs. Jacksonville Paper Company, 87 L. Ed. 393, 397	15

Warren-Bradshaw Drilling Company vs. Hall, 317 U. S.	63 S. Ct. 123, 87 L. Ed.	15
Waterman vs. McMillan, (U. S. C. A., D. C.)	135 F. 2d 807	5
Wilkinson vs. Swift & Co., (U. S. D. C. N. Texas, 1941)	Vol. 1, Wage and Hour Cases, 604	27

STATUTES

Code of 1930, Sections 1712-14	20
4 Edward III, Chapter 7	22
Mississippi Statutes, Section 2301	28
28 U. S. C. A., Sec. 832	4, 5
29 U. S. C. A., Sec. 206	8
29 U. S. C. A., Sec. 203 (j)	9
29 U. S. C. A., Sec. 216	19, 31
28 U. S. C. A., Secs. 780 and 788	31

TEXTBOOKS

25 C. J., p. 220	20
1 C. J. 185	25
Webster's Dictionary	18
Words & Phrases, "Penalty"	34

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 159.

MRS. EULA MAY WALTON, ADMINISTRATRIX OF
THE ESTATE OF FRED WALTON, DECEASED,
PETITIONER,

VS.

SOUTHERN PACKAGE CORPORATION,
RESPONDENT.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO MOTION OF PETITIONER FOR LEAVE TO PROCEED IN FORMA PAUPERIS.

MAY IT PLEASE THE COURT:

Respondent respectfully submits that petitioner's motion for leave to proceed *in forma pauperis* and that record be printed at public expense should be denied for the following reasons, to-wit:

(1) The motion is presented by the Administratrix of the Estate of Fred Walton, deceased, but does not have attached thereto affidavits of persons to be benefited that they are unable to pay costs.

(2) It does not affirmatively appear from the motion, affidavit or record that petitioner is a citizen of the United States.

(3) The motion and affidavit do not show that petitioner is entitled to the redress which she seeks.

(4) It does not appear that the motion for leave to proceed *in forma pauperis* was presented to or filed with the Supreme Court of Mississippi.

The motion and affidavit filed by petitioner refer to the heirs at law of Fred Walton, deceased. There was not presented or filed in support of said motion affidavit of any heir or heirs of Fred Walton, deceased, except the petitioner as Administratrix of the Estate. It affirmatively appears from the record that attorneys for petitioner have a definite and fixed interest in the proceeds involved in this suit (R. 53). The attorneys for petitioner do not join in the motion and no affidavit by said attorneys has been attached to or filed with said motion. Under the authorities the motion is fatally defective, and we call attention to the following:

Carter v. Kurn, (C. C. A. 8) 120 F. 2d 261; *Bogdan v. Provident Life & Accident Ins. Co. of Chattanooga, Tenn.*, (C. C. A. 5) 79 F. 2d 721; *Chetkovich v. U. S.*, (C. C. A. 9) 47 Fed. 394; *Reed v. Pennsylvania Company*, (C. C. A. 6) 111 Fed. 714.

Carter v. Kurn, *supra*, is directly in point and states the rule as follows:

This cause came on to be heard on the duly verified petition of John W. Carter, praying that an order be entered permitting him to prosecute the appeal without paying the cost or giving security or paying the cost of printing the record, and the motion made by the appellees to dismiss the appeal (which we treat on this hearing as resistance to the petition). The petitioner states that he qualified as administrator of the estate of Edward Stanley Harp, deceased, for the purpose of instituting the action for damages in the District Court, and that neither he personally nor as such administrator, nor any of the beneficiaries in said action, are financially able to defray the ex-

pense of printing the record, to give security for same, or to pay the cost of appeal or to give security therefor.

"The record discloses that the named decedent left five children surviving him who would be the beneficiaries in case of recovery in the action, and that the action was prosecuted by attorneys who, according to the averments of the appellees, each have a substantial interest in the recovery.

"Two points made by appellees against granting the petition are that the requirements of the applicable statute, 28 U. S. C. A., Par. 832, have not been complied with, in that (1) there is no showing that petitioner believes that he is entitled to the redress he seeks and that his appeal is meritorious; (2) the several persons beneficially interested in the action have not presented poverty affidavits:

"We think both points are well taken and that the present petition to proceed *in forma pauperis* should be denied. Where, as in this case, the action is prosecuted for the joint benefit of several persons, the petition to proceed *in forma pauperis* is insufficient unless each person directly interested in recovery makes the poverty affidavit required by the statute, stating facts to show the financial inability. * * * (Italics Ours).

In the *Boggan Case*, *supra*, the Circuit Court of Appeals for the Fifth Circuit announced the rule as follows:

"* * * The statute under which the appeal is prosecuted is a statute of grace. It extends to those embraced in it, but only to those. *Quittner v. Motion Picture Producers & Distributors*, (C. C. A.) 70 F. 2d 331, the privilege of prosecuting, without paying or securing the costs, appeals which are substantially meritorious, and which, because of the appellant's poverty, could not be prosecuted if bond or security were required. It may not be used by persons not poor persons, in whose interest, though not parties to the suit, the litigation is being conducted, to prosecute an appeal without giving bond or costs. * * * (Italics Ours).

In *Chetkovich v. United States*, *supra*, the Court said:

"The affidavit in support of the application for leave to prosecute the appeal in this case in *forma pauperis* avers:

"There is no person interested by contract or otherwise in the said cause of action or entitled to share in the recovery thereunder who is able to pay or secure said fees or costs."

Such an affidavit is insufficient. In cases of this kind the affidavit must be made by every person interested in the recovery, including the attorney, if he has a direct interest in the result of the action. *United States v. Ross*, (C. C. A.) 298 Fed. 64, and cases therein cited" (Italics Ours).

Unless both the heirs of the Estate and the attorneys make the required pauper's affidavit petitioner is not entitled to proceed in *forma pauperis* under the statute. It is apparent that the motion should be denied.

In addition, the benefits of 28 U. S. C. A., Sec. 832, cannot be claimed by anyone other than a citizen of the United States. It does not affirmatively appear from either the motion, the affidavit or the record that petitioner is a citizen of the United States and for this reason the motion should be denied. *Volk v. B. F. Sturtevant Co.*, 99 Fed. 532, affirmed 104 Fed. 276; *De Maurey v. Swope*, 100 F. 2d 530; *Johnson v. Nickoloff*, 52 F. 2d 1074; *Austin v. United States*, (D. C. Ill.) 40 Fed. Supp. 777.

In addition, no attempt is made by petitioner in her motion or affidavit for leave to proceed in *forma pauperis* to show a meritorious right to have a Writ of Certiorari issued in this cause. A showing on behalf of petitioner that she is entitled to the redress sought is a condition precedent to her right to proceed in *forma pauperis*. Having failed so to do, her motion should be denied. *Stewart v. St. Sure*, (C. C. A. Cal.) 109 F. 2d 162, certiorari denied, 309 U. S. 653, 60 S. Ct. 470, 84 L. Ed. 1003, rehearing

denied 309 U. S. 696, 60 S. Ct. 588, 84 L. Ed. 1036; *Smith v. Johnston*, 109 F. 2d 152; *Fisher v. Cushman*, (C. C. A., Wash.), 99 F. 2d 918; *De Groot v. United States*, (C. C. A., Alaska) 88 F. 2d 624; *Kelly v. Johnston*, (C. C. A., Cal.) 99 F. 2d 582.

Petitioner seeks permission to proceed *in forma pauperis* in her attempt to persuade this Court to review a decision of the Supreme Court of Mississippi. 28 U. S. C. A., Sec. 832, requires the petition or motion to be allowed to proceed *in forma pauperis* to be presented to the trial court or to the court from which an appeal is sought in order for that court to pass on the merit of the proposed appeal. It does not appear that petitioner's motion to proceed *in forma pauperis* was presented to the trial court or to the Supreme Court of Mississippi. *Waterman v. McMillan*, (U. S. C. A., D. C.) 135 F. 2d 807; *Bayless v. Johnston*, 127 F. 2d 531.

Respondent respectfully submits that the motion to be allowed to proceed *in forma pauperis* should be denied.

**BRIEF FOR RESPONDENT IN OPPOSITION TO
PETITION FOR CERTIORARI**

POINT I.

The Petitioner Was Not Engaged in an Occupation Necessary to the Production of Goods for Commerce Within the Fair Labor Standards Act, or Not Engaged in the "Production of Goods for Commerce."

STATEMENT.

The Southern Package Corporation was engaged in the business of manufacturing lumber and veneer products, a substantial portion of which are shipped out of the State of Mississippi. The petitioner was employed in one of the respondent's plants situated in Claiborne County, Mississippi, as a night watchman. He brought suit in the Circuit Court of Claiborne County, Mississippi, for wages, liquidated damages, and attorney's fees under the Act of Congress referred to.

In his declaration the petitioner alleged that he was employed as a night watchman in respondent's plant and assigned to several other minor duties. The case was tried on an agreed statement of facts, wherein the following stipulation was contained:

"That the plaintiff's decedent, Fred Walton, was, on the 14th day of August, 1939, an adult resident citizen of Port Gibson, Claiborne County, Mississippi, and on or about said date approached the defendant and sought employment as a night watchman at its Port Gibson plant. That the defendant, thereupon, employed said Fred Walton as a night watchman at said plant. That said plant did not operate at night during the period of the employment of plaintiff's intestate, but did when business required it to operate at night during other periods; and the defendant was not engaged in the actual production of goods for interstate

commerce during the period of time that said Fred Walton was on duty. Fires were kept under the boilers in said plant during the night by a fireman on duty for said purpose. Occasionally, repairs were made to the machinery at night by employees other than said Fred Walton. It was the duty of said Walton, as night watchman at said plant, to make an hourly round of the plant and punch a night watchman's clock located at various stations on said plant and to report any fires and trespassers. A record thereof was preserved, and Walton's services were rendered primarily for the purpose of reducing the fire insurance rates or premiums upon the buildings, machinery, and fixtures situated on said premises. *Except for the reduction obtained in said insurance rates, a night watchman would not have been employed, and such services were not necessary nor used in connection with the actual production of veneer or other timber products for shipment in interstate commerce, and said Walton performed no service in connection with the actual manufacturing of veneer or other products.*

The petitioner recovered a judgment in the trial court, and on appeal the Supreme Court of Mississippi reversed the judgment and the suit was dismissed. The case is reported in 11 So. 2d 912, *Southern Package Corporation v. Walton*, and presents the question as to whether or not the petitioner, under the facts shown in the record, was engaged in producing goods for commerce, or engaged in an occupation necessary to the production of goods for interstate commerce so as to be entitled to the benefits of the Fair Labor Standards Act of 1938.

ARGUMENT.

Sec. 206 of 29 U. S. C. A. provides in part as follows:

Minimum Wages, Effective Date.

"(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates * * *

Sec. 203 (j) of 29 U. S. C. A. defines "produced" as follows:

Definitions.

* * * (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked or in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on, such goods, or in any process or occupation necessary to the production thereof in any State."

In order that an employee shall be subject to this Act, it must appear not merely that the employer is engaged in producing goods for shipment in interstate commerce or otherwise engaged in interstate commerce, but it is also necessary that the particular employee involved be employed in the performance of some duty either in interstate commerce or in some process constituting a part of the production of goods for interstate commerce. It is quite evident that Fred Walton, while serving as a night watchman for the appellant, was not engaged in interstate commerce nor was he engaged in the production of goods or in any process incident to the production of goods in the usual sense. The only possibility of the services of said night watchman coming within the terms of the Act is by reason of the somewhat unusual definition of the term "produced," which includes not only things which are commonly and usually understood to be within the meaning of said term, but also includes employment "in any process or occupation necessary to the production thereof" (*Italics Ours*). The question then arises as to whether or not the services rendered by a night watchman under said circumstances were necessary to the production of goods to be shipped in interstate commerce.

The Supreme Court of Mississippi was of the opinion that under the facts in this record the petitioner did not

come within the Act of Congress involved; but that the question of his compensation was one within the state law. The Court used the following language:

"Thus, it will be seen, that the portion of the language which is to be construed in determining whether the act is to be applied to the employment of the night watchman in the case at bar are the words 'or in any process or occupation necessary to the production thereof, in any State,' since he was manifestly not engaged in producing, manufacturing, mining, handling, transporting or in any other manner working on such goods.

"In adopting the foregoing and rather unusual definition of the term 'produced,' as related to the production of goods for interstate commerce, so as to include among those engaged in such employment also those in any occupation 'necessary' to the production of such goods, it should be presumed that the Congress thus enlarged the meaning of the term as far as it was deemed expedient. Although numerous terms used in the act are specifically defined therein, the meaning of the word 'necessary' was left intact as found in Webster's Dictionary—'Essential to a desirable projected end or condition; not to be dispensed with without loss, damage, inefficiency or the like; as, a necessary tool.' Moreover, unless the term 'any occupation necessary to the production thereof' is to be given an expanded meaning by judicial construction, it may be confidently asserted that under the agreed statement of facts in the instant case, the act would have no application, since the work of this employee had only the most tenuous relation, and was not in any sense 'necessary' to the production of goods by this employer for commerce. Presumably the night watchman slept during the daytime, while the other employees were engaged in the production of the goods for commerce. He contributed nothing to such work of production, nor to enable those engaged in production to more efficiently perform their duties. No more goods were produced by reason of his employment, and he would no doubt have been kept on duty for the purpose for which he was employed even if it had been necessary to close

down the plant for an indefinite period because of a break-down, or on account of other incidents interfering with its continued operation. If the plant had been running at night, the services of a night watchman would not have been required at all, even to satisfy the request of the insurance company."

In giving the history of the Act, the Court used the following language:

"The legislative history mentioned in *Jewel Tea Co. v. Williams*, *supra*, relating to the enactment of the Fair Labor Standards Act, discloses that the conference draft, of the bill, which was finally enacted into law after the Senate had refused to accede to the House amendment, which broadened the coverage of the bill by requiring time and a half for overtime for all employees of an employer engaged in commerce in an industry affecting commerce, restored the test of coverage contained in the original Senate bill, and that Senator Pepper of Florida, a member of the Conference Committee, which prepared the Act as adopted, said, in answer to an objection to the broad scope of the Act, 'I want it distinctly stated that this proposed law is not applicable to all employees of an industry which itself is engaged in interstate commerce. It is applicable only to those employees who themselves are engaged either in interstate commerce, or the production of goods for interstate commerce, and the contrary theory was definitely rejected by the Committee.' 83 C. R. 9168 (Senate—75th Cong., 3rd Sess. June 14, 1938); also, *Jax Beer Co. v. Redfern*, 5 Cir., 124 F. 2d 172."

Petitioner's counsel rely upon the case of *Kirschbaum v. Walling*, 316 U. S. 517, 86 L. Ed. 1638, Cases Nos. 910 and 924, October, 1941, Term of this Court, No. 110 before the Circuit Court of Appeals, 124 F. 2d 967, and is reported in 38 Fed. Supp., page 204. Case No. 924 is reported in 125 F. 2d 207.

This Court in stating the activities of the employees involved, used the following language:

"These employees perform the customary duties of persons charged with the effective maintenance of a loft building. The engineer and the firemen produce heat, hot water, and steam necessary to the manufacturing operations. They keep elevators, radiators, and fire sprinkler systems in repair. The electrician maintains the system which furnishes the tenants with light and power. The elevator operators run both the freight elevators which start and finish the interstate journeys of goods going from and coming to the tenants, and the passenger elevators which carry employees, customers, salesmen and visitors. The watchmen protect the buildings from fire and theft. The carpenters repair the halls and stairways and other parts of the buildings commonly used by the tenants. The porters keep the buildings clean and habitable."

As Judge Frankfurter stated in the majority opinion in the last mentioned case, the determination of the question depends upon the facts in each particular case. The question as to the status of an employee occupying the position of a night watchman is a mixed question of law and fact, and must be determined from the facts in each case.

We call your Honors' attention to the fact that in the case of *Arsenal Building Corporation v. Walling*, being Case No. 924, referred to above, the record indicates that there was no watchman involved at all. We have carefully read the case as reported from the District Court, as well as the Circuit Court of Appeals, and no statement is made that a watchman was involved at all.

The case of *Fleming v. A. B. Kirschbaum Company*, cited on page 9 of the appellee's brief and decided by the District Court of Eastern Pennsylvania on April 2, 1941, appears to be reported in 38 Fed. Supp. 204. This case involved the question of whether or not the Act was applicable to such employees. The duty of such employees was stated by the Court as follows:

"As part of the consideration for the rent, the defendant furnishes the services of three elevator operators, two watchmen, three firemen, an engineer, a carpenter and a carpenter's helper, and a porter or cleaner, all of whom are employed and paid by it. It also employs a cashier and bookkeeper who are not involved in this proceeding. The elevator operators carry both passengers and freight in varying ratios between the several floors of the building. The watchmen pass through the building, closing windows, putting out lights, guarding against fires, etc. The engineer supervises the operation of the boilers, which produce steam used by some of the tenants in their manufacturing operations, the various pumps in the building, and the production of direct electric current which is used to light the building and is also used by two of the tenants; he also keeps the elevators in proper working order and takes care of the sprinkler tank. The firemen fire the boilers and occasionally supervise the running of the pumps when the engineer is called to another part of building. The carpenter replaces sash chains, repairs the doors of the building and paints the common hallways, staircases, etc."

It will be noted that the watchman's duty in the above case was not limited merely to the usual duties of a watchman, but that he had duties with respect to maintaining the building, such as closing windows, putting out lights, etc.

The Supreme Court of Mississippi in its opinion called attention to the fact that in every reported case where the status of a watchman was involved, such employee was charged with some additional duty of sufficient importance to bring the employee within the statute. And while the Court in its opinion in the Kirschbaum case does not expressly so state, the Court must have been impressed with the fact that the record disclosed that the watchman in that case had other and responsible duties. Not only that, but aside from the fact that the record in No. 924 does not disclose that a watchman is involved, the

cases presented a very different state of facts from the facts shown in this record. There we have two buildings in urban communities, in which the lessees were manufacturing merchandise calculated to attract thieves and thefts. They were situated in large cities, surrounded by organized crime, for which reason doubtless the lessee required the lessor to provide a watchman. It appears that the operations continued there at night, that divers and sundry persons were going in the buildings and the merchandise was exposed to theft, and that the watchmen were on duty at night.

In the present case we have a wood-working plant in a small suburban community manufacturing commodities not at all attractive to theft. The watchman was only on duty at night. The plant was not under operation at all at that time. The duties of the watchman were to walk through the building every hour during the night and make record of the fact that he had done so by registering in the appliance provided for that purpose, in his routine travels through the building.

It was his duty to watch the building and report fire or trespassers. He was charged with no other duty in respect to fire and trespassers. Upon making his rounds through the building, which he was required to do each hour, he then had no other duties to perform, and he could retire, relax, or do anything he pleased, go to sleep, if he felt like it. In other words, his duties were that of a watchman with the most limited authority and duties.

We further call the attention of the Court to the fact that the night watchman was not necessary to the production of goods in commerce, that his presence involved only a question of fire insurance rates, and it was expressly agreed by the petitioner in this case, as follows:

"Except for the reduction obtained in said insurance rates, a night watchman would not have been employed, and such services were not necessary nor

used in connection with the actual production of veneer or other timber products or shipment in interstate commerce, and said Walton performed no service in connection with the actual manufacturing of veneer or other products."

The authorities are well settled that an employee does not fall within the provisions of the act unless the services are necessary for production in interstate commerce; that the same fact that the services may affect interstate commerce or may be a unit of interstate commerce is not sufficient.

It is further held that the burden of proof is upon the petitioner to show by preponderance of the evidence that the services of petitioner fall within the provisions of the act.

The following authorities are directly in point:

Warren-Bradshaw Drilling Company v. Hall, 317 U. S. 63 S. Ct. 123, 87 L. Ed. . . . It was held that the burden of proof was upon the employee to show a state of facts entitling him to recover.

In the case of *Walling v. Jacksonville Paper Company*, 87 L. Ed. 393, the court, at page 397, used the following language:

"As to the balance, we do not think the Administrator has sustained the burden which is on a petitioner of establishing error in a judgment which we are asked to set aside."

On the same page, beginning at the bottom of Column 1, the following language is used:

"In this connection we cannot be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states. S. Rep. No. 884, 75th Cong., 1st Sess., p. 5; 83 Cong. Rec., 75th Cong., 3d Sess., Pt. 8, p. 9169. Moreover as we stated in *A. B. Kirschbaum Co. v. Walling*, *supra* (316 U. S., pp. 522, 523, 86 L. Ed.

1646, 1647, 62 S. Ct. 1116), Congress did not exercise in this Act the full scope of the commerce power. We may assume the validity of the argument that since wholesalers doing a local business are in competition with wholesalers doing an interstate business, the latter would be prejudiced if their competitors were not required to comply with the same labor standards. That consideration, however, would be pertinent only if the Act extended to businesses or transactions affecting commerce. But as we noted in the *Kirschbaum* case the Act did not go so far.

In the case of *Ansel Higgins v. Carr Brothers Company*, 87 L. Ed. (Advance Sheets) 398, the court used the following language:

"Petitioner in his brief described the business in somewhat greater detail and seeks to show an actual or practical continuity of movement of merchandise from without the state to respondent's regular customers within the state. But here, unlike *Walling v. Jacksonville Paper Co.*, there is nothing in the record before us to support those statements not to impeach the accuracy of the conclusion of the Supreme Judicial Court of Maine that, when the merchandise coming from without the state was unloaded at respondent's place of business its interstate movement had ended. Some effort is made to show that the court below applied an incorrect rule of law in the sense that it gave the Act too narrow a construction. In that connection it is argued that respondent is in competition with wholesalers doing an interstate business and that it can by underselling affect those businesses and their interstate activities. As we indicated in *Walling v. Jacksonville Paper Co.*, that argument would be relevant if this Act had followed the pattern of other federal legislation such as the National Labor Relations Act (see 29 U. S. C. A. Sec. 152 (7), Sec. 160 (a)), and extended federal control to business affecting commerce. But as we pointed out in *A. B. Kirschbaum Co. v. Walling*, 316 U. S. 517, 86 L. Ed. 1638, 62 S. Ct. 1116, this Act did not go so far but was more narrowly confined.

"This petitioner has not maintained the burden of showing error in the judgment which he asks us to set aside."

In the case of *Pederson v. Delaware, L. & W. R. R. Co.*, 229 U. S. 146, 57 L. Ed. 1125, 33 S. Ct. 648, it was held that an employee to come within the act must be indispensable to the carrying on of interstate commerce.

In the case of *Overstreet v. North Shore Corporation*, (Advance Sheets) 87 L. Ed. 423, where the employee was engaged in operating a toll road and bridge in interstate commerce, it was held that such person was within the act, using the following language:

"We think that practical test should govern here. Vehicular roads and bridges are as indispensable to the interstate movement of persons and goods as railroad tracks and bridges are to interstate transportation by rail. If they are used by persons and goods passing between the various states, they are instrumentalities of interstate commerce. Cf. *Corrington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 218, 38 L. Ed. 962, 14 S. Ct. 1087, 4 Inters. Com. Rep. 649. Those persons who are engaged in maintaining and repairing such facilities should be considered as engaged in commerce even as was the bolt carrying employee in the *Pederson* case, 229 U. S. 146, 57 L. Ed. 1125, 33 S. Ct. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779, *supra*, because without their services these instrumentalities would not be open to the passage of goods and persons across state lines. And the same is true of operational employees whose work is just as closely related to the interstate movement. Of course, all this is subject to the qualification that the Act does not consider as an employer the United States or any State or political subdivision of a State, and hence does not apply to their employees: Sec. 3 (d)."

In the case of *McLeod v. Threlkeld*, decided June 7th, 1943, the Court decided that the cook of a contractor furnishing meals to railroad employees of an interstate carrier was not engaged in interstate commerce, using the following language:

"Such a ruling under the Federal Employers' Liability Act, after the *Bolle*, *Industrial Commission* and *Bezie* Cases, *supra*, note 9, should not govern our conclusions under the Fair Labor Standards Act. These three later cases limited the coverage of the Federal Employers' Liability Act to the actual operation of transportation and acts so closely related to transportation as to be themselves really a part of it. They recognized the fact that railroads carried commerce and were thus a part of it but that each employment, that indirectly assisted the functioning of that transportation was not a part. The test under this present act, to determine whether an employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it. Employee activities outside of this movement, so far as they are covered by wage-hour regulations, are governed by the other phrase: 'production of goods for commerce.'"

In the case of *United States v. Railroad Co.*, 220 Fed. 215, it is held that the word "necessary" means more than merely convenient. Webster's Dictionary defines the word "necessary" as follows:

"Essential to a desirable or projected end or condition; not to be dispensed with without loss, damage, inefficiency or the like, as, a necessary tool."

Other cases denying the right of a night watchman to recover under the act are as follows:

Hart v. Gregory, 220 N. C. 180, 16 S. E. 837; *Rogers v. Glazer*, 32 Fed. Supp. 990; *Brown v. Bailey*, 177 Tenn. 185, 145 S. W. 2d 105; *Brown v. Carter Drilling Co.*, 38 Fed. Supp. 489; *Dotson v. Stowers*, 37 Fed. Supp. 937; *Bowman v. Pace Company*, 119 F. 2d 858.

We respectfully submit that the facts in this case are insufficient to show that the Supreme Court of Mississippi committed error in holding that the petitioner was not entitled to recover.

POINT II.

Cause of Action Did Not Survive.

A.

The Federal Statute Does Not Provide for Survival of Suit under the Wage and Hour Law.

The cause of action sued on exists solely by virtue of the Federal statute, U. S. C. A. 29, Par. 216.

We, therefore, quote this Section in full:

"216. Penalties; civil and criminal liability.

"(a) Any person who willfully violates any of the provisions of section 215 shall upon conviction thereof be subject to a fine of not more than \$10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

"(b) Any employer who violates the provisions of section 206 or section 207 of this chapter shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. *Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.* June 25, 1938, Ch. 676, §16, 52 Stat. 1069" (Italics Ours).

It will be noted that the above mentioned section nowhere provides for the survival of the cause of action

after the employee's death. There is no other provision either of the Federal Wage and Hour Law or in any other Federal statute providing for the survival of this cause of action. There is no general Federal statute providing for survival of causes of action. Counsel for plaintiff has not insisted that the cause of action survive by virtue of either the Federal statute on Wage and Hours, and any other Federal statute.

Also, see 25 C. J., p. 220. The statute having expressly enumerated the persons who could "maintain" the cause of action created solely by an existence of the statute this enumeration would have the effect of preventing the maintenance of such a suit by anyone else. Such an action can be maintained only by an employee or his designated agent.

B.

Assuming the Federal Statute to Be Silent As to Survival, the Common Law As It Existed at the Time of Its Adoption in America Would Control.

Counsel for the plaintiff states the above mentioned rule in the following language:

"The general rule is that a cause of action given by a federal statute, if no specific provision is made by act of Congress for its survival, survives or not according to the principles of the common law existing in England at the time of the formation of the Union."

We are inclined to agree with the foregoing statement of the rule.

However, in applying the rule, counsel for the plaintiff has overlooked the recent decision of *Erie v. Tompkins*, 304 U. S., p. 64, 82 L. Ed., p. 1188, in which Judge Brandeis says, "there is no federal general common law," and expressly overruled *Swift v. Tyson*, 16 Peters, p. 1, 10 L. Ed. 856, and the cases following this.

The Mississippi statute with reference to survival in Sections 1712-14, Code of 1930, would have no application.

This is correctly stated by counsel for the plaintiff who cites the case of *Schrieber v. Sharpless*, 28 L. Ed. 65. We have examined this case very carefully and find that it holds, that the survival of the cause of action under the Federal statute depends upon the common law as of the formation of the Union, and that a statute on survival of actions subsequently adopted by one of the States has no application. Of course, the Mississippi statute was adopted to relieve parties from the rigor of the common law with respect to survival of causes of action, and the statute permits the survival of many causes of action that did not survive under the common law, as it existed at the time of the formation of the Union.

C.

This Cause of Action Arises Out of an Alleged Tort and Is Not a Suit for Breach of a Contract.

Plaintiff's counsel insists that the suit is for breach of a contract. The only authority cited in support of this view is the case of *Cole v. Harker* (W. D. Tenn.). Although this case is alleged to have been decided October 10, 1939, counsel states in his brief that it is "not yet reported." Since October 10, 1939, there have been approximately eleven columns of the Federal Supplement published, and if this case has not yet been reported, it is very unlikely that it ever will be reported. We also have made a careful search of the reported cases and are unable to locate whether this case has been reported, and naturally would be unable to comment upon what the case held on the soundness of the reasoning supporting the same. At any rate, it was a decision of a "one man court" and evidently was not regarded as being of sufficient importance to justify it being incorporated in the reports.

In the case of *Terner v. Clickstein & Terner, Inc.*, 283 N. Y. 299, 28 N. E. 2d 846 (N. Y., 1940), the Appellate Court of the State of New York, in dealing with a suit

under the Fair Labor Standards Act for additional wages and overtime, held that the jurisdiction was in a court of law and not equity, and that the nature of the action was that of a tort and not a breach of a contract, using the following language:

"The primary right arises from a tort and the right of action is not dependent upon any equitable feature or incident (Pomeroy's Eq. Juris. (4th Ed.), p. 178). Under such conditions, an action in equity will not lie" (Italics Ours).

The theory that the law becomes a part of the contract has been definitely discarded in the case of *St. John v. Brown et al.*, (N. D. Texas, Fort Worth Division, March 28, 1941) 38 Fed. Supp. 385, wherein the following language was used:

*"Though this law was in effect, the employment contract was made without reference to it. * * * Here, extra pay for overtime is a thing the law demands. Whatever that per hour contractual rate is figured to be is the rate Congress had in mind when it said, 'not less than one and one-half times the regular rate at which he is employed.' The law did not become a part of these contracts. * * * The law exacts certain things and forbids others, and fixes civil and criminal penalties for its violation. Even the 'one and one-half times' provision is akin to a penalty, intended to discourage overtime employment and to encourage a greater spread of employment. * * *" (Italics Ours).*

. D.

Cause of Action Does Not Survive under Common Law.

Under the common law as it originally existed the general rule was that causes of action based upon a contract would survive, but that causes of action based upon a tort would not survive. In order to broaden this rule the statute of 4 Edward III, Chapter 7, was enacted. This statute and its effect is stated in the case of *Moore v. Backus*, 78 F. 2d 571 (573), in the following language:

"For many centuries the *maxim actio personalis moritur cum persona* applied to all tort actions. In the fourteenth century, however, the English statute of 4 Edward III, Chapter 7, was enacted, which limited and became a part of the common law. That statute is the basis of this controversy and reads as follows:

"Whereas in times past executors have not had actions for the trespass done to their testators, as of the goods and chattels of the same testators carried away in their life, and so such trespasses have hitherto remained unpunished; it is enacted that the executors in such cases shall have an action against the trespassers to recover damages in like manner as they, whose executors they be, should have had if they were in life" (Quoted in Pollock on Torts (11th Ed.), p. 66).

There was no other statute enacted in England relating to the subject of survival of causes of action prior to the formation of the American Union.

It will be noted that the foregoing statute was intended to apply primarily to suits for conversion of specific, tangible personal property wherein the estate of the decedent had been damaged and that of the defendant enriched.

The early decisions under the common law were thoroughly reviewed in the cause of *Sullivan v. Associated Bill Posters, etc.*, 6 F. 2d 1000 (1004, 1007), in the following language:

"It was a rule of the common law that most causes of action based on contract survived, while most of those founded on tort abated. But the rule was subject to various exceptions. The real test, so far as tort actions were concerned, seems to have been whether the injury on which the cause of action was based affected property rights, or affected the person alone. In the former case the cause of action survived, while in the latter it abated. See 21 Encyc. of Pl. & Pr. 31. The common-law rule, as laid down in 3 Blackstone's Comm. 302, is as follows:

* * * The death of either party is at once an abatement of the suit. And in actions merely personal, arising *ex delicto* (from wrong done), for wrongs actually done or committed by the defendant, as trespass; battery, and slander, the rule is that *actio personalis moritur cum persona* (a personal action dies with the person); and it shall never be revived either by or against the executors or other representatives. For neither the executors of the plaintiff have received, nor those of the defendant have committed, in their own personal capacity, any manner of wrong or injury.

In *Hambly v. Trott*, Comp. 371, 376, which was decided in 1776, Lord Mansfield, discussing the maxim above quoted, declared that it was not generally true and much less universally so. The question in that case was whether an action of trover could be maintained against an executor for a conversion by his testator. The case was twice argued before the court, and at its conclusion it was said: *Cur. advisari vult.* On a subsequent day Lord Mansfield delivered the unanimous opinion of the court, in which he said:

Here therefore is a fundamental distinction. If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer as beating or imprisoning a man, etc., there the person injured has only a reparation for the *delictum* in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As, for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value of sale of the trees he shall. So far as the tort itself goes, an executor shall not be liable; and therefore, it is that all public and all private crimes die with the offender, and the executor is not chargeable; but, so far as the act

of the offender is beneficial, his assets ought to be answerable, and his executor therefore shall be charged." "

If "specific property" is acquired, the court held the cause of action survives; if otherwise, the court held that it does not.

In 1. C. J. 185, it is said:

"In order that a right of action arising out of a tort should survive against the executor or administrator of the tort-feasor, it was generally held essential that the latter should, by the wrongful act, have acquired specific property by which, or by the proceeds of which, the assets in the hands of his personal representatives were increased. It was not enough that the benefit resulted or that expense was saved to the tort-feasor by which his estate was larger than it otherwise would have been."

In the case now before the court it does not appear that the deceased defendant has in his estate any of the plaintiff's property. Assuming as we must the allegations of the complaint to be true, they amount to a claim that the estate of the defendant has been increased by profits made by the defendants wrongfully diverted from the plaintiff. So far as the injury done to property is concerned, it is indirect and consequential, and, the action being *ex delicto*, under the foregoing authorities it would not survive against the personal representatives. And even if it were shown that one's property was actually diminished, and not merely that he was prevented from increasing it by gains he otherwise would have made, the action would not survive. For the test of survivability does not turn on the fact that one's estate has been diminished. Thus in *Henshaw v. Miller*, 58 U. S. 211, 15 L. Ed. 222, it was held an action brought to recover damages for fraudulently recommending a third party as worthy of credit whereby financial loss resulted and one's

estate was diminished did not survive, either at common law or under the statute of Virginia.

The entire theory of the Wagner Act prohibiting the issuance, except in certain instances, of injunctions in restraining orders by the Federal Court in labor disputes is based upon the theory that labor is not property and that a labor contract is not an article of commerce. As stated in the case of *Sullivan v. Associated Bill Posters, etc.*, 6 F. 2d 1000 (1012),

"they did not diminish the plaintiff's 'property' which was something already acquired. That which it hoped to acquire, but had not yet obtained, certainly did not constitute its 'property' within the meaning of the statute, and so did not survive."

E.

Cause of Action Does Not Survive under Mississippi Decisions.

We have heretofore called attention to the fact that the Mississippi statutes on this subject have no application. These statutes were passed to increase the kinds of action that would survive under the common law, and the fact that the statutes have no application militates against the theory of survival instead of assisting it. Prior to the adoption of the statute causes for personal injury did not survive.

However, under the Mississippi decisions, special attention is called to the case of *McNeely v. City of Natchez*, 148 Miss. 268, 114 So. 484, holding that a cause of action for a penalty for failure to secure a franchise from the City of Natchez to operate a ferry did not survive; and the case of *Catchings v. Hartman*, 178 Miss. 672, 174 So. 553, holding that cause of action for libel and slander did not survive the death of the plaintiff.

The *McNeely* case very clearly holds that a cause of action for a penalty does not survive. In a subsequent division of this brief, we deal with the question of

whether or not the alleged benefits constituted a penalty and will not attempt to go into that question at this time as it would constitute repetition.

The McNeely case and Catchings case are interesting only in that they indicate that the courts of this state have not been inclined to expand the common law on the subject of a survival of causes of actions. We quote from the case of *Catchings v. Hartman*, *supra*, as follows:

"(1, 2) It is conceded, as it must be, that common law causes of action for slander or libel do not survive the death of either the wrongdoer or the person injured, wherefore, if there be any such survival, it must be by force of a sufficient statute. The question, therefore, is whether an action of slander is within the term 'personal action' as used in the above-quoted statute. In *McNeely v. City of Natchez*, 148 Miss. 268, 274, 114 So. 484, 487, it was held that this statute, being in derogation of the common law, must be strictly construed, and that the term 'personal action' must be interpreted according to its strictly technical meaning; and the court thereupon, so interpreting the meaning, held that a personal action, under the said statute, is one brought for the recovery of personal property, for the enforcement of some contract or to recover damages for its breach, or for the recovery of damages for the commission of an injury to the person or property."

POINT III.

Action Is Barred by One-Year Statute of Limitations.

It is well settled that this action would be controlled by the statute of limitations of the State of Mississippi. See *Wilkinson v. Swift & Co.*, (U. S. D. C. N. Texas, 1941) Vol. 1, Wage and Hour Cases, 604; *Cline v. Super-Cold S. W. Co.*, (U. S. D. C. N. Texas, 1941) 1 W. H. Cases, 777; *Klotz v. Ippolito*, (U. S. D. C. S. Texas, 1941) 40 Fed. Supp. 422; *Littleton v. White Motor Company*, (U. S. D. C. N. Texas, 1941) 1 W. H. Cases 914; *Duncan v. Montgomery*

Ward & Co., Inc., (U. S. D. C. S. Texas, 1941) 42 Fed. Supp. 879; *Owen v. Liquid Carbonic Corporation*, (U. S. D. C. S. Texas, 1941) 42 Fed. Supp. 774; *Collins v. Hancock*, (La. First Judicial District Court, 1941) 1 W. H. Cases 1117.

The Mississippi statute applicable is Section 2301, which reads as follows:

"2301. Action for penalty commenced in one year.—All actions and suits for any penalty or forfeiture on any penal statute, brought by any person to whom the penalty or forfeiture is given, in whole or in part, shall be commenced within one year next after the offense was committed, and not after."

The most recent pronouncement upon this question is that of *State for Use of Rogers v. Newton*, 191 Miss. 611, 3 So. 2d 816, in which the court, speaking through Chief Justice Smith, said in part:

"On a former appeal herein, *National Surety Corporation et al. v. State for Use of Rogers*, 189 Miss. 540, 198 So. 299, 302, one of the questions presented was whether Mrs. Rogers had the right to sue on the certificates. The appellant's contention there was that the liability imposed by the statute is a penalty and therefore the right to recover it is not assignable. The court held that it is a penalty and not assignable under the general law, but that the statute itself confers the right upon any holder of any such pay certificates to sue thereon. This liability imposed by the statute was there referred to five separate times as a 'penalty.' On return of the case to the court below, the appellees plead the limitation of Section 2301, Code of 1930, which provides that:

'All actions and suits for any penalty or forfeiture on any penal statute, brought by any person to whom the penalty or forfeiture is given, in whole or in part, shall be commenced within one year next after the offense was committed, and not after.'

"The Court, as it should have done, followed our former opinion and held that the liability here imposed on the superintendent to be a penalty and, therefore, as more than a year had elapsed since the cause of action accrued, it was barred by limitation.

"(2-4) Leaving out of view the law of the case rule and expressing no opinion as to its applicability *vel non* here, the question presented is whether this Court should now depart from its holding on the former appeal herein and hold this liability not to be a penalty. We shall assume, though the fact may be otherwise, that the words 'penalty' and 'forfeiture' are used in Section 2301, Code of 1930, as being synonymous and interchangeable.

"In our opinion on the former appeal herein, to which we adhere, it was said that 'this statute is highly penal.' An examination of the statute discloses that this is in accord with the legislative intent. Its sanctions are designated as penalties in its title, which sets forth that its purpose, among other things, is 'to regulate the expenditure of school funds in the several counties and separate school districts; to restrict the amount of such expenditures to amount of revenue available therefor; and to provide penalties for violations of the provisions of this act.' Two penalties are imposed by Section 14 of the Act on County superintendents of education to punish them for, and to deter them from, violating the Section: (1) Payment of the face value of pay certificates wrongfully issued; and (2) fine and imprisonment or both for the violation of any of the provisions of the section. That the first is not payable to the State, but to the holder of the certificate does not take it out of the penal category. *Bank of Hickory v. May*, 119 Miss. 239, 80 So. 704; 59 C. J. 11; 25 C. J. 1149, 1178. This fact is recognized by Section 2301 of the Code hereinbefore set out, which applied only to penalties and forfeitures payable to individuals. But, it is said that this provision of the statute is remedial and not penal. The title of the statute, in this connection, refers only to penalties and does not remotely indicate that any of its provisions are simply remedial. But that aside, a remedial statute is one that cures defects in, or

enlarges or abridges the scope of, a former law. 1 Blackstone's Com. 86; 59 C. J. 1106; 25 R. C. L. 765. E. g., a statute that grants a theretofore non-existent remedy for a wrong inflicted. *Metzger et al. v. Joseph*, 111 Miss. 385, 71 So. 645. A statute that makes a wrong-doer liable to the person wronged for a fixed sum without reference to the damage inflicted by the commission of the wrong is penal. *Bank of Hickory v. May*, *supra*; *Gulf & S. I. R. Company v. Laurel, etc., Co.*, 172 Miss. 630, 158 So. 778; 159 So. 838; 160 So. 564; *O'Sullivan v. Felix*, 233 U. S. 318, 34 S. Ct. 596, 58 L. Ed. 980; 25 C. J. 1178, Sec. 72.

"When tested by these rules, it will appear that this provision of Section 14, Chapter 255, Laws of 1936, is not remedial but imposes a penalty."

It is submitted that, when the present statute is tested by the same rules, it is likewise penal. We call special attention to the case of *Mengel Co. v. Ishee*, (decided by the Mississippi Supreme Court, December 8, 1941) and reported in 4 So. 2d 878, in which Judge Anderson, expressing his own views and not that of the majority of the court, made the following statement:

"The writer of this opinion, however, does not agree that there is concurrent jurisdiction and on account of the importance of the question is constrained to state his views. In the first place the 100 percent 'liquidated damages' provided for in the Wage and Hour Law is a penalty and not damages. The name given it by the statute does not control, but instead the nature of the recovery. In other words, naming it 'liquidated damages' does not settle the question. *Goodstein v. Board of Levee Commissioners*, 153 Miss. 783, 122 So. 856; *Helwig v. United States*, 180 U. S. 605, 23 S. Ct. 427, 47 L. Ed. 614; *First National Bank v. Morgan*, 132 U. S. 141, 10 S. Ct. 37, 38, 33 L. Ed. 282; and 21 R. C. L. 210."

The question now before the court is not that of whether the provisions of the Wage and Hour Law constitute a penalty in the sense that jurisdiction would be exclusive in the Federal Court, but the question is

whether it constitutes a penalty in the sense used by the Mississippi statute of limitations and we believe the case of *State v. Newton*, *supra*, would be conclusive on this subject.

In this connection we call the court's attention to the fact that the very heading adopted by Congress for Section 216, is Penalty; Civil and Criminal Liability. Most certainly the fine to be imposed would be a criminal penalty or a criminal liability, and the double damages and attorneys' fees are in the nature of a civil penalty.

Counsel for plaintiff have cited quite a few cases in which it is contended that the courts have decided that the civil provisions of Section 216 are not penalties. However, all of these cases are based upon the question of the jurisdiction of the court and more especially as to whether a state court would have jurisdiction.

Congress had previously reserved jurisdiction to the Federal Court of all cases to enforce federal penalties, 28 U. S. C. A., Secs. 780 and 788. By specifically providing in Sec. 216 of 29 U. S. C. A. that action under the Wage and Hour Law might be heard in either a federal or a state court, it necessarily conferred jurisdiction upon the state court to hear such causes, regardless of whether the same be a penalty or not. Therefore, it is not necessary to determine whether a penalty is provided for in Section 216 in determining the jurisdiction of the Court. Congress had the authority to confer jurisdiction upon the state court in matters of this kind whether it be a penalty or not, and Congress has said that such jurisdiction is conferred, and therefore decisions dealing with the question of penalties in jurisdictional matters is merely dicta and not necessary to the decision of the questions involved.

In the case of *Stringer v. Griffin Grocery Co.*, (Tex. Ct. Civ. App.) 149 S. W. 2d 158, the court states this in the following language:

"It is urged that section 216(b) provides a penalty to a party aggrieved, denominated 'liquidated damages' thus the suit thereunder must, in accordance with 28 U. S. C. A., p. 371, be maintained in a Federal district court. We do not so regard it. * * * however, it can be said that the Act of Congress awards a penalty to the parties aggrieved, and specifies the remedy for its enforcement in a court of competent jurisdiction, as in a civil action, it may be enforced in a state court. *Claflin v. Houseman*, 93 U. S. 130, 23 L. Ed. 833; *Pennsylvania Dixie Cement Corp. v. H. Wales Lines Co.*, 119 Conn. 603, 178 Atl. 659; 15 C. J. 1159. Note 30, 21 C. J. S., Courts, 526; *Campbell v. Superior Decalomania Co., Inc.*, (C. C. Tex.) 31 Fed. Supp. 633; *Robertson v. Argus Hosiery Mills*, (D. C. Tenn.) 32 Fed. Supp. 19. It is therefore the right of the employee to prosecute his suit in any court of competent jurisdiction, Federal, territorial or state, and when once attached, the right may be asserted in that court, although other courts may also have jurisdiction of the cause. * * *

In the case of *Adair v. Traco Division*, 192 Ga. 59, 14 S. E. 2d 466, the Supreme Court of Georgia again explains that the decisions dealing with this question are related exclusively to jurisdictional questions and do not determine generally whether the action calls for a penalty. This case is stated in the following language:

"Bell, Justice. According to the reasoning in several decisions by the United States Supreme Court, the words 'penalties and forfeitures,' as used in U. S. Judicial Code, Sec. 256, as amended, U. S. C. A., Title 28, Sec. 371, *supra*, 'refer to something imposed in a punitive way for an infraction of a public law, and do not include a liability imposed for the purpose of redressing a private injury, even though the wrongful act be a public offense and punishable as such.' *Meeker v. Lehigh Valley Railroad Co.*, 236 U. S. 412, 423, 35 S. Ct. 328, 332; 59 L. Ed. 644, Ann. Cas. 1916B, 691. While the fair labor standards act was professedly designed for the public good as related to interstate commerce, a suit for the 'additional equal lia-

bility as liquidated damages' is an action to redress a private injury, and the relief sought would, under the decision just cited, be 'not punitive, but strictly remedial.' See also *Huntington v. Attrill*, *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U. S. 390, 397, 27 S. Ct. 65, 51 L. Ed. 241. Whether the additional sum recoverable as 'liquidated damages' be in fact a penalty though not so called, yet since it was characterized as liquidated damages by the same law-making body which enacted the provision as to exclusive jurisdiction of suits for penalties and forfeitures, we must conclude that it cannot be considered as a penalty within the meaning of the statute conferring exclusive jurisdiction upon the Federal courts 'of all suits for penalties and forfeitures incurred under the laws of the United States,' and that the phrase 'and court of competent jurisdiction' would include a State court. For other decisions in which the same conclusion has been reached, see *Hart v. Gregory*, 218 N. C. 184, 10 S. E. 2d 644, 130 A. L. R. 265; *Tapp v. Price-Bass Co.*, (Tenn. Sup.) 147 S. W. 2d 107, decided February 1, 1941; *Emerson v. Mary Lincoln Candies, Inc.*, 173 Misc. 513, 17 N. Y. S. 2d 851; *Turner v. Glickstein & Turner*, 283 N. Y. 209, 28 N. E. 2d 846; *Stringer v. Griffin Grocery Co.*, (Tex. Civ. App.) 149 S. W. 2d 158, February 8, 1941. And see articles on this subject in *Michigan Law Review* for January, 1941, and in *27 Virginia Law Review* 328."

It might be noted in passing that the Georgia court of appeals held the provision of the Wage and Hour Law to constitute a penalty. See the case of *Anderson v. Meacham*, 62 Ga. App. 145, 8 S. E. 2d 459:

"The fact that the employee may bring his action for an additional equal amount as liquidated damages is nothing more or less than a penalty fixed and incurred under the law of the United States. We think the employee in this case, having elected to bring his action for a penalty as is provided by the act, is restricted to the United States court for his relief and that the demurrer as to this ground was properly sustained. See *Helwig v. United States*, 188 U. S.

605, 23 S. Ct. 427, 47 L. Ed. 614; *Pacific Mail Steamship Company v. Schmidt*, 241 U. S. 245, 36 S. Ct. 581, 60 L. Ed. 982; *Collie v. Ferguson*, 281 U. S. 52, 50 S. Ct. 189, 74 L. Ed. 696; *O'Sullivan v. Felix*, 233 U. S. 318, 34 S. Ct. 596, 58 L. Ed. 980; *Southern Ry. Co. v. Inman, Akers & Inman*, 11 Ga. App. 564, 75 S. E. 908."

The term "penalty" is a very elastic term and has been given various and sundry meanings, depending upon the sense in which the same has been used. Some of the decisions which the appellant relies upon have referred to "penalty" in the sense of a fine or punishment accruing to the state or nation and have held that any amount accruing to an individual is not a penalty, regardless of whether it be awarded as damages or be inflicted as punishment. This is entirely too narrow a view of the word "penalty" and we submit that in the common and usual acceptation of the word "penalty" that it covers not only fines and forfeitures, but civil liabilities inflicted by way of punishment.

See Words & Phrases on the word, "penalty," from which it will appear that the word "penalty" is properly used in a narrower sense, "exacted as punishment for a civil wrong," and a "penalty" is an agreement to pay a greater sum to secure the payment of a less sum.

We respectfully submit that the action was penal in nature and barred by the one-year Mississippi statute of limitations.

We respectfully submit that the application for certiorari should be denied.

Respectfully submitted,

W. S. HENLEY,
WM. H. WATKINS, SR.,
P. H. EAGER, JR.,
THOS. H. WATKINS,

Attorneys for Respondent.

Certificate.

The undersigned William H. Watkins, of counsel for the respondent in the above styled and numbered cause, hereby certifies that a true and correct typed copy of the foregoing brief has been this day forwarded by United States mail, postage prepaid, to Honorable Charles Ingle, Attorney at Law, Natchez, Mississippi, attorney of record for petitioner.

This 23rd day of August, 1943.

WILLIAM H. WATKINS.

FILE COPY

Office - Supreme Court, U. S.

FILED

DEC 14 1943

**CHARLES ELMORE CROPLEY
CLERK**

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 159

**MRS. EULA MAY WALTON, ADMINISTRATRIX OF THE
ESTATE OF FRED WALTON, DECEASED,**

Petitioner,

vs.

SOUTHERN PACKAGE CORPORATION,

Respondent.

BRIEF FOR RESPONDENT.

W. S. HENLEY,

✓ WILLIAM H. WATKINS,

✓ P. H. EAGER, JR.,

✓ MRS. ELIZABETH HULEN,

Attorneys for Respondent.

INDEX.

SUBJECT INDEX.

	Page
Brief for respondent	1
The opinion of the court below	1
Statement of the case	1
Argument	4
Summary	4
Point A—Fred Walton was not an employee engaged in commerce. Fred Walton was not an employee engaged in the production goods for commerce, in that he was not employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on goods for commerce and he was not employed "in any process or occupation necessary to the production" of goods for commerce. He was, therefore, not entitled to the benefits of the Fair Labor Standards Act of 1938, Title 29 U. S. C. A., Sections 201-219	4, 5
Point B—This is an action for a penalty and is barred by Section 2301, Miss. 1930 Code, requiring that actions for penalties be commenced within one year next after the offense was committed and not after	25
Point C—The petitioner here has no cause of action under the Fair Labor Standards Act of 1938, Title 29 U. S. C. A., Section 216(b), in that the employee involved is now deceased and the cause of action would not survive said employee	33

	Page
The Federal Statute does not provide for survival of suit under the Wage and Hour Law	33
Assuming the Federal Statute to be silent as to survival, the Common Law as it existed at the time of its adoption in America would control	34
This cause of action arises out of an alleged tort and is not a suit for breach of contract	35
Cause of action does not survive under Common Law	37
Cause of action does not survive under Mississippi decisions	40

TABLE OF CASES CITED.

<i>Adair v. Traco Division</i> (Ga.), 14 S. E. (2d) 466	30
<i>Arsenal Building Corp. v. Walling</i> , Case No. 924, 125 F. (2d) 207	9
<i>Baggett v. Henry Fisher Packing Co.</i> , 37 F. Supp. 670	17
<i>Bowman v. Pace Company</i> , 119 F. 2d 858	24
<i>Brown v. Bailey</i> , 177 Tenn. 185, 145 S. W. (2d) 105	24
<i>Brown v. Carter Drilling Co.</i> (D. C. Tex.), 38 F. Supp. 489	23, 24
<i>Catchings v. Hartman</i> , 178 Miss. 672, 174 So. 553	41
<i>Chapman v. Home Ice Co.</i> (D. C.), 43 F. Supp. 424	24
<i>Cline v. Super-Cold S. W. Co.</i> (U. S. D. C. N. Texas, 1941), 1 W. H. Cases, 777	25
<i>Collins v. Hancock</i> (La. First Judicial District Court, 1941), 1 W. H. Cases 1117	25
<i>Consolidated Edison Co. v. National Labor Relations Board</i> , 305 U. S. 197, 83 L. Ed. 426, 59 S. Ct. 206	8
<i>Delaware etc. R. R. Co. v. Scales</i> (C. C. A. 2), 18 F. (2d) 73	7, 19
<i>Dotson v. Stowers</i> , 37 Fed. Supp. 937	24

<i>Duncan v. Montgomery Ward & Co., Inc.</i> (U. S. D. C. S. Texas, 1941), 42 Fed. Supp. 879	25
<i>Erie v. Tompkins</i> , 304 U. S., p. 64, 82 L. Ed., p. 1188	34, 35
<i>Feaster v. Southern Railway Co.</i> (C. C. A. 4), 15 F. (2d) 540	19
<i>Fleming v. A. B. Kirschbaum Co.</i> , Case No. 910, 124 F. (2d) 967, 38 F. Supp. 204	9
<i>General Oil Co. v. Crain</i> , 209 U. S. 211, 28 S. Ct. 475, 52 L. Ed. 754	32
<i>Hardy v. Atl., etc., Ry. Co.</i> (Ga.), 93 S. E. 18	19
<i>Hart v. Gregory</i> , 220 N. C. 180, 16 S. E. 837	24
<i>Henshaw v. Miller</i> , 58 U. S. 211, 15 L. Ed. 222	40
<i>Jewel Tea Co. v. Williams</i> (C. C. A. 10), 118 F. (2d) 202	24
<i>Kansas City etc. Co. v. Arkansas</i> , 269 U. S. 148, 46 S. Ct. 59, 70 L. Ed. 204	32
<i>Kirschbaum v. Walling</i> , 316 U. S. 517, 86 L. Ed. 1638	6
<i>Klotz v. Ippolito</i> (U. S. D. C. S. Texas, 1941), 40 Fed. Supp. 422	25
<i>Littleton v. White Motor Company</i> (U. S. D. C. N. Texas, 1941), 1 W. H. Cases 914	25
<i>Lorenzetti v. American Trust Co.</i> , 45 F. Supp. 128	14
<i>McCulloch v. Maryland</i> , 4 Wheat. 315, 413	14
<i>McGregor v. Hogan</i> , 263 U. S. 234, 44 S. Ct. 50, 68 L. Ed. 282	31
<i>McLeod v. Threlheld</i> , decided Oct. 19, 1942, 87 L. Ed. (Adv. Sheet) 1154	19
<i>Missouri, etc. v. Dockery</i> , 191 U. S. 165, 24 S. Ct. 53, 48 L. Ed. 133	32
<i>Moore v. Backus</i> , 78 F. 2d 571 (572)	37
<i>McNeely v. City of Natchez</i> , 148 Miss. 268, 114 So. 484	41
<i>New Amsterdam Cas. Co. v. State Industrial Comm.</i> (Okla.), 193 Pac. 974	17
<i>New York Central R. R. Co. v. White</i> , 243 U. S. 188, 61 L. Ed. 667, 37 S. Ct. Rep. 247	19
<i>Overstreet v. North Shore Corp.</i> , decided Feb. 1st, 1943, 87 L. Ed. (Adv. Sheet) 423	19

	Page
<i>Overnight Transportation Co. v. Missel</i> , 86 L. Ed. 1683, 316 U. S. 572, 62 S. Ct. 1216	31
<i>Owen v. Liquid Carbonic Corporation</i> (U. S. D. C. S. Texas, 1941), 42 Fed. Supp. 774	25
<i>Packing Co. v. Court of Industrial Relations</i> , 267 U. S. 552, 45 S. Ct. 441, 69 L. Ed. 785	32
<i>Railroad Co. v. White</i> , 238 U. S. 507, 35 S. Ct. 865, 59 L. Ed. 1433	32
<i>Rogers v. Glazer</i> , 32 F. Supp. 990	17, 22, 24
<i>State for Use of Rogers v. Newton</i> , 191 Miss. 611, 3 So. (2d) 816	26
<i>Schrieber v. Sharpless</i> , 28 L. Ed. 65	35
<i>Sim v. Edenborn</i> , 242 U. S. 131, 37 S. Ct. 36, 61 L. Ed. 199	31
<i>S. H. Robinson Co. v. Larue</i> (Tenn.), 156 S. W. (2d) 359	14
<i>Southern Railway Co. v. Varnell</i> (Ala.), 131 So. 803, writ of cert. denied 283 U. S. 852, 75 L. Ed. 1460, 51 Sup. Ct. 561	19
<i>Snyder Granite Co. v. Gast Realty & Inv. Co.</i> , 245 U. S. 288, 38 S. Ct. 125, 63 L. Ed. 292	32
<i>Stringer v. Griffin Grocery Co.</i> (Tex.), 149 S. W. (2d) 158	30
<i>Swift v. Tyson</i> , 16 Peters, p. 1, 10 L. Ed. 856	35
<i>St. John v. Brown et al.</i> (N. D. Texas, Fort Worth Division, March 28, 1941), 38 Fed. Supp. 385	36
<i>Sullivan v. Associated Bill Posters, etc.</i> , 6 F. 2d 1000 (1004, 1007)	37, 38, 40
<i>Terrace v. Thompson</i> , 263 U. S. 197, 44 S. Ct. 15, 68 L. Ed. 255	31, 32
<i>Terner v. Clickstein & Terner, Inc.</i> , 283 N. Y. 299, 28 N. E. 2d 846 (N. Y., 1940)	36
<i>Wabash etc., R. Co. v. Industrial Comm.</i> (Ill.), 121 N. E. 569	19
<i>Warren-Bradshaw Drilling Co. v. O. F. Hall</i> , 87 L. Ed. (Adv. Sheet) pg. 99, 317 U. S. —	17
<i>Wilkinson v. Swift & Co.</i> (U. S. D. C. N. Texas, 1941), Vol. 1, Wage and Hour Cases, 604	25

INDEX

v

STATUTES CITED.

Page

Fair Labor Standards Act of 1938, Title 29, U. S.

C. A.:

Sees. 201-219

4

Sec. 216(b)

4

29 U. S. C. A.:

Sec. 216

30, 33

Sec. 203(j)

5

Sec. 207, in Sec. 216 of 29 U. S. C. A.

5

25 C. J., p. 220

34

1 C. J. 185

39

28 U. S. C. A., Sees. 780 and 788

30

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 159

MRS. EULA MAY WALTON, ADMINISTRATRIX OF THE
ESTATE OF FRED WALTON, DECEASED,

Petitioner.

vs.

SOUTHERN PACKAGE CORPORATION,

Respondent.

BRIEF FOR RESPONDENT.

1.

The Opinion of the Court Below.

The Supreme Court of the State of Mississippi in Cause No. 35152 therein, entitled "Southern Package Corporation v. Eula May Walton, Administratrix, etc.", by opinion rendered on February 15th, 1943, reported in 11 So. (2d) 912, entered a judgment in said appellate court for the appellant, the employer respondent here, holding that the particular employee involved was not engaged in an "occupation necessary to the production" of goods for interstate commerce. The opinion in said court is set out in the record, pages 5-17.

2.

Statement of the Case.

This case was tried on an agreed statement of facts (R: 1-4).

As appears from said agreed statement of facts, the respondent, the Southern Package Corporation was engaged in the business of manufacturing lumber and veneer products, a substantial portion of which was shipped out of the State of Mississippi. The respondent, therefore, was, under the decisions of this Court, engaged in interstate commerce.

The employee here involved, the original petitioner, was employed in one of the respondent's plants situated in Claiborne County, Mississippi, as a night watchman. This employee, Fred Walton, brought suit in the Circuit Court of Claiborne County, Mississippi for wages, liquidated damages and attorney's fees under Section 207 and Section 216 of the Fair Labor Standards Act of 1938.

The following facts appear in the agreed statement:

"That the plaintiff's decedent, Fred Walton, was, on the 14th day of August, 1939, an adult resident citizen of Port Gibson, Claiborne County, Mississippi, and on or about said date approached the defendant and sought employment as a night watchman at its Port Gibson plant. That the defendant, thereupon, employed said Fred Walton as a night watchman at said plant. That said plant did not operate at night during the period of the employment of plaintiff's intestate, but did when business required it to operate at night during other periods; and the defendant was not engaged in the actual production of goods for interstate commerce during the period of time that said Fred Walton was on duty. Fires were kept under the boilers in said plant during the night by a fireman on duty for said purpose. Occasionally, repairs were made to the machinery at night by employees other than said Fred Walton. It was the duty of said Walton, as night watchman at said plant, to make an hourly round of the plant and punch a night watchman's clock located at various stations on said plant and to report any fires and trespassers. A record thereof was preserved.

and Walton's services were rendered primarily for the purpose of reducing the fire insurance rates or premiums upon the buildings, machinery, and fixtures situated on said premises. Except for the reduction obtained in said insurance rates, a night watchman would not have been employed, and such services were not necessary nor used in connection with the actual production of veneer or other timber products for shipment in interstate commerce, and said Walton performed no service in connection with the actual manufacturing of veneer or other products."

No suit or claim was filed for the minimum wage and it was agreed that no amount was due under the Fair Labor Standards Act of 1938 for any failure to pay the minimum wage provided for therein. However, it was agreed in the statement of facts "that if said Fred Walton was entitled to receive over-time" as provided for under said act, "that there would have accrued under the provisions of said act" the sum of \$400.00 for over-time, of which amount \$376.00 accrued in the one year prior to the filing of the suit and the balance of \$24.00 accruing within one year from the filing of the original pleading in this cause. The original petitioner thus brought suit for \$400.00 and an additional penalty of \$400.00 and attorney's fees, under Section 16(b) (Para. 216).

The original petitioner, Fred Walton, died during the pendency of the suit. The present petitioner, Mrs. Eula May Walton, was appointed Administratrix of his estate and revived the suit in her name, over the objection of the respondent.

As stated, the cause was tried entirely on the "Agreed Statement of Facts" and the only facts with reference to the nature of the employment of Fred Walton are those quoted above therefrom. The petitioner recovered a judgment in the trial court for \$400.00 plus a penalty of \$400.00 and \$100.00 attorney's fees, or a total of \$900.00. On ap-

peal to the Supreme Court of Mississippi the judgment of the lower court was reversed and judgment was entered in said appellate court for respondent and the suit was dismissed.

3.

Argument.**SUMMARY.**

Point A. Fred Walton was not an employee engaged in commerce. Fred Walton was not an employee engaged in the production of goods for commerce, in that he was not employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on goods for commerce and he was not employed "IN ANY PROCESS OR OCCUPATION NECESSARY TO THE PRODUCTION" of goods for commerce. He was, therefore, not entitled to the benefits of the Fair Labor Standards Act of 1938, Title 29 U. S. C. A., Secs. 201-219.

Point B. This is an action for a penalty and is barred by Section 2301, Miss. 1930 Code, requiring that actions for penalties be commenced within one year next after the offense was committed and not after.

Point C. The petitioner here has no cause of action under the Fair Labor Standards Act of 1938, Title 29 U. S. C. A. Sec. 216(b), in that the employee involved is now deceased and the cause of action would not survive said employee.

POINT A.

Fred Walton was not an employee engaged in commerce. Fred Walton was not an employee engaged in the production of goods for commerce, in that he was not employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on goods for commerce and he was not employed "in any process or occupation neces-

7

sary to the production" of goods for commerce. He was, therefore, not entitled to the benefits of the Fair Labor Standards Act of 1938, Title 29 U. S. C. A., Sections 201-219.

The portion of the Fair Labor Standards Act of 1938 under which recovery is sought is Section 207 of 29 U. S. C. A., which provides as follows:

"Sec. 207. Maximum Hours

"(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce——"

By Sec. 203(j) of 29 U. S. C. A., an employee who is engaged in the production of goods for commerce is defined as follows:

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

A cause of action is granted to such an employee if the employer violates Sec. 207 of 29 U. S. C. A. in Sec. 216 of 29 U. S. C. A. as follows:

"(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. . . ."

It is admitted that Fred Walton was not himself engaged in the production of goods for commerce save and unless he can be said to have been engaged in an "occupation necessary to the production" of goods for commerce. It is admitted and quite evident that Fred Walton while serving as night watchman for the respondent was not himself engaged in the production, manufacture, mining, handling or transporting of any goods for commerce. The only possibility of the services of Walton coming within the terms of the act is under that part of the act including employees engaged in any occupation "necessary to the production" of goods for commerce.

The specific question before this Court, therefore, on the agreed and admitted facts in this case is: Was Fred Walton while acting as a night watchman proved to have been engaged in an occupation necessary to the production of lumber and veneer products by the respondent?

We respectfully submit that a decision of this case is not controlled by *Kirschbaum v. Walling*, 316 U. S. 517, 86 L. Ed. 1638. Petitioner relies principally upon this case, and in the Supreme Court of the State of Mississippi Chief Justice Smith dissented upon the ground that this decision was controlling. Any and all general principles announced in that decision are, of course, controlling here. However, in that opinion itself this Court recognized the fact that the applicability of the Fair Labor Standards Act to any particular employee is a separate and distinct fact to be decided upon the evidence introduced with reference to the nature of the employment in the particular case. In other words, each case must be decided with reference to the particular duties of the employee involved as developed or shown by the facts in the specific record before the court. In that opinion this Court said:

"The criterion is necessarily one of degree and must be so defined. This does not satisfy those who

seek for mathematical or rigid formulas. * * *
Santa Cruz Fruit Packing Co. v. National Labor Relations Board, 303 U. S. 453, 467, 82 L. Ed. 954, 960, 58 Sup. Ct. 656. 'What is needed is something of that common sense accommodation of judgment to kaleidoscopic situations which characterize the law in its treatment of problems of causation. *Gully v. First National Bank*, 299 U. S. 109, 117, 81 L. Ed. 70, 74, 57 Sup. Ct. 96.' "

As was said in *Delaware etc. R. R. Co. v. Scales* (C. C. A. 2), 18 F. (2d) 73, in holding that a private police officer employed by a railroad engaged in interstate commerce, whose duties were to arrest offenders and who had nothing to do with transportation, was not engaged in interstate commerce so as to come under the Employer's Liability Act:

* * * * * Each case is made to stand on its own bottom, by asking the question whether, at the time of injury, the employee was engaged in work closely connected with interstate transportation as practically to be part of it? If the answer in any particular set of facts is 'Yes', then the act covers that employee's case. *Southern, etc., Co. v. Industrial*, 251 U. S. 259, 40 S. Ct. 130, 64 L. Ed. 258, 10 A. L. R. 1181; *Erie Railroad v. Collins*, 253 U. S. 77, 40 S. Ct. 450, 64 L. Ed. 790, affirming (C. C. A.) 259 F. 172.

"This method of ascertaining jurisdiction renders particular cases of rather small value, for almost no set of circumstances is exactly like the next phenomenon. * * * "

In other words, the Fair Labor Standards Act does not attempt to enumerate and this Court has not attempted to enumerate exactly what occupations are always necessary to production of goods for commerce. That question is left to be determined upon the facts of the individual cases as they arise. *Santa Cruz Fruit Packing Co. v. Na-*

tional Labor Relations Board, supra; Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206.

This Court did not attempt to hold in *Kirschbaum v. Walling, supra*, that every night watchman at a plant producing goods for commerce was engaged in an occupation necessary to the production of the goods. No more did Your Honors in that opinion decide that every electrician, elevator operator, porter, etc. working in a business where goods for commerce are produced was engaged in an occupation necessary to the production of those goods for commerce.

In the case of *Kirschbaum v. Walling, supra*, two things and two things only were actually decided: First, that employees of an independent contractor, not itself engaged in commerce or in the production of goods for commerce, can themselves be engaged in an occupation necessary to the production of goods for commerce; and, two, that under the facts in that case the actual employees involved were performing services necessary to the production of goods in commerce.

In fact, the principal decision of that case was the first question stated above. That was the question to which most of the briefs were directed. It was rather assumed that if the employees of the owners of the building could be said to be engaged in an occupation necessary to the production of goods for commerce, that then these employees there involved were so engaged. Unquestionably, the engineers and electricians and elevator operators were engaged in an occupation necessary to the production of goods in commerce if any employee of the owners of the building could be so classed. No distinction was drawn there between the various employees and apparently no argument was made that some of the employees might be so classed and others not. It was apparently taken for granted that

all of the employees there were performing duties necessary to the effective maintenance of a loft building. Therefore, if being engaged in the effective maintenance of the loft building was being engaged in an occupation necessary for the production of goods in commerce, then these employees as a group all came within the act.

The opinion in *Kirschbaum v. Walling*, *supra*, is a decision of two separate cases: *Arsenal Building Corp. v. Walling*, Case No. 924, the decision in the lower court being reported in 125 F. (2d) 207, and *Fleming v. A. B. Kirschbaum Co.*, Case No. 910, the opinion of the lower court appearing in 124 F. (2d) 967 and 38 F. Supp. 204.

In the *Arsenal Building Corporation* case, the record indicates that there was no watchman involved at all. We have carefully read the case as reported from the district court, as well as the Circuit Court of Appeals, and no statement is made that any of the employees involved were watchmen. It will, also, be observed that in the *Fleming* case, where watchmen were involved, that the duties of these watchmen were not limited to the usual duties of a watchman, but that the watchman also had responsibility with reference to the maintenance of the building. This Court, in stating the activities of the employees involved, used the following language:

“These employees perform the customary duties of persons charged with the effective maintenance of a loft building. The engineer and the firemen produce heat, hot water, and steam necessary to the manufacturing operations. They keep elevators, radiators, and fire sprinkler systems in repair. The electrician maintains the system which furnishes the tenants with light and power. The elevator operators run both the freight elevators which start and finish the interstate journeys of goods going from and coming to the tenants, and the passenger elevators which carry employees, customers, salesmen and visitors. The watch-

men protect the buildings from fire and theft. The carpenters repair the halls and stairways and other parts of the buildings commonly used by the tenants. The porters keep the buildings clean and habitable.

As part of the consideration for the rent, the defendant furnishes the services of three elevator operators, two watchmen, three firemen, an engineer, a carpenter and a carpenter's helper, and a porter or cleaner, all of whom are employed and paid by it. It also employs a cashier and bookkeeper who are not involved in this proceeding. The elevator operators carry both passengers and freight in varying ratios between the several floors of the building. *The watchmen pass through the building, closing windows, putting out lights, guarding against fires, etc.* The engineer supervises the operation of the boilers, which produce steam used by some of the tenants in their manufacturing operations, the various pumps in the building, and the production of direct electric current which is used to light the building and is also used by two of the tenants; he also keeps the elevators in proper working order and takes care of the sprinkler tank. The firemen fire the boilers and occasionally supervise the running of the pumps when the engineer is called to another part of the building. The carpenter replaces sash chains, repairs the doors of the building and paints the common hallways, stair-cases, etc."

The Supreme Court of Mississippi in its opinion called attention to the fact that in every reported case where a watchman was held within the act, such employee was charged with some additional duty of sufficient importance to bring the employee within the statute. And while the Court in its opinion in the *Kirschbaum* case does not expressly so state, the Court must have been impressed with the fact that the record there disclosed that the watchman had other responsible duties. Not only that but these cases

presented a very different state of facts from the facts shown in this record. There we have two buildings in urban communities, in which the lessees were manufacturing merchandise calculated to attract thieves and thefts. They were situated in large cities, surrounded by organized crime, for which reason doubtless the lessee required the lessor to provide a watchman. It appears that the operations continued there at night, that divers and sundry persons were going in the buildings at all times and the merchandise was exposed to theft and fire.

In the present case we have a wood-working plant in a small suburban community manufacturing commodities not at all attractive to theft. The watchman was only on duty at night. The plant was not under operation at all at that time. The duty of the watchman was merely to walk through the building every hour during the night and make record of the fact that he had done so by registering in the appliance provided for that purpose, in his routine travels through the building, and report fire or trespassers. He was charged with no other duty in respect to fire and trespassers. Upon making his rounds through the building, which he was required to do each hour, he then had no other duties to perform, and he could retire, relax, or do anything he pleased, go to sleep, if he felt like it. In other words, his duties were that of a watchman with the most limited authority and responsibility.

We respectfully submit that this Court by holding the watchmen, under the facts and circumstances reflected by the record in *Kirschbaum v. Walling*, *supra*, were engaged in an occupation necessary to the production of goods in commerce, did not hold that all watchmen in plants producing goods in commerce had identical duties and all such watchmen as a class would necessarily come under the Fair Labor Standards Act.

As we have stated, under the facts in *Kirschbaum v.*

Walling, the elevator operators were patently engaged in an occupation necessary to the production of goods in commerce, if employees of the owners of the building charged with the duty of the effective maintenance of the loft building were ever engaged in an occupation necessary to the production of goods in commerce. In that case the tenants could not have used the building without the elevator service. A very different situation would arise, for example, in a building of only two stories, of a type easily and customarily used by tenants engaged in commerce without elevator service but where an elevator had been installed and was operated by the owner of the building for reasons personal to himself, although the elevator, being available, was actually used at times by the tenants.

We are, therefore, upon this appeal, presenting to Your Honors for determination a question not decided by *Kirschbaum v. Walling, supra*. The question before this Court at this time is whether *under the facts presented by this record*, Fred Walton, while acting as a night watchman for respondent, was as a question of law, on admitted facts, engaged in an occupation necessary to the production of goods for commerce.

The fact that the employer here, the respondent, was engaged in commerce does not, of course, affect a decision of this question. That the Fair Labor Standards Act does not cover every employee of an employer engaged in commerce is clearly stated in *Kirschbaum vs. Walling, supra*.

This proposition was correctly stated in the opinion by the Supreme Court of Mississippi in this case as follows:

"In the case of *Abadie v. Cudahy Packing Co.*, 37 Fed. Supp. 164, the Court was dealing with a situation where a bookkeeper or ledger clerk was claiming the benefits of the Act, and Judge Borah, in rendering the opinion, said: 'Even if it could be said that defendant was engaged in the production of goods for

commerce because it 'handled or in any other manner worked on' the goods sold in interstate commerce it would not follow that plaintiff was employed in an occupation necessary to the production thereof as there is no casual relationship between his occupation and production. Plaintiff's occupation may have been necessary in respect to defendant's business but his duties as ledger clerk were not so closely related to production as can be considered necessary thereto.'

"The legislative history mentioned in *Jewel Tea Co. v. Williams*, *supra*, relating to the enactment of the Fair Labor Standards Act discloses that the conference draft of the bill, which was finally enacted into law after the Senate had refused to accede to the House amendment, which broadened the coverage of the bill by requiring time and a half for overtime for all employees of an 'employer engaged in commerce in an industry affecting commerce,' restored the test of coverage contained in the original Senate bill, and that Senator Pepper, of Florida, a member of the Conference Committee which prepared the Act as adopted, said, in answer to an objection to the broad scope of the Act, 'I want it distinctly stated that this proposed law is not applicable to all employees of an industry which itself is engaged in interstate commerce. It is applicable only to (fol. 68) those employees who themselves are engaged either in interstate commerce, or the production of goods for interstate commerce, and the contrary theory was definitely rejected by the Committee.' 83 C. R. 9168 (Senate—75th Cong. 3rd Sess., June 14, 1938); also, *Jax Beer Co. v. Redfern*, 124 Fed. (2d) 172."

Therefore, again may we state to the court that the only question for determination on this appeal is whether under the agreed statement of facts here involved, the employee Fred Walton was proved to be actually engaged in an occupation "necessary to the production" of goods in commerce?

The case of *Kirschbaum v. Walling*, *supra* did determine

the applicable general definition of the word "necessary" in the act. The word "necessary" has been defined by courts construing specific statutes and instruments as having every possible shade of meaning between "useful" or "helpful" on the one hand and "indispensible" on the other hand. See Words & Phrases, "necessary". The Supreme Court of the State of Mississippi in its opinion quoted the Webster's Dictionary definition as follows:

"Essential to a desirable or projected end or condition; not to be dispensed with without loss, damage, inefficiency or the like; as, a necessary to."

Petitioner in her brief herein insists upon the applicability of the definition in *McCulloch v. Maryland*, 4 Wheat, 315, 413, as follows:

"To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and as being confined to those singular means, without which the end would be entirely unattainable."

This definition was applied only to an interpretation of the power granted to Congress by the Constitution to enact all laws which were necessary and proper for carrying into execution the enumerated powers conferred on the government. This broad definition of "necessary" is usually applied in the interpretation of powers (for example: powers of a corporation or officers). It is rarely otherwise applied. See Words & Phrases, "Necessary".

Most courts in interpreting the word "necessary" in the Fair Labor Standards Act have refused to apply the liberal definition of "beneficial", and have not gone so far as to define it as "indispensible", but have held that the word "necessary" therein should be defined as "essential". See *S. H. Robinson Co. v. Larue* (Tenn.), 156 S. W. (2d) 359, *Lorenzetti v. American Trust Co.*, 45 F. Supp. 128. This Court in *Kirschbaum v. Walling* adopted the definition of

"necessary" as "essential", holding that an employee was engaged in an occupation necessary to the production of goods for commerce when his duties were an essential part of the process for production for commerce. This Court used the following language:

"* * * In our judgment, the work of the employees in these cases had such a *close and immediate tie* with the process of production for commerce, and was therefore so much an *essential* part of it, that the employees are to be regarded as engaged in an occupation necessary to the production of goods for commerce."

That, we submit, is the test applicable here. Was Fred Walton, under the facts in this case, performing the work that had such a close and immediate tie with the process of production that his work was an essential part of the production of goods for commerce? We respectfully submit that the work of Fred Walton as reflected by the agreed statement of facts here had no close or immediate tie with the process of manufacturing lumber and was not essential to or an essential part of the manufacture of the lumber and veneer. In fact, the petitioner in the agreed statement of facts has admitted as much. Fred Walton not only had no duties whatsoever beyond making an hourly round of the plant and reporting fires and trespassers, but it is admitted that he was not essential to the production of the lumber; that a night watchman was employed only for the purpose of reducing somewhat the amount of the fire insurance premium, in accordance with the general practice of fire insurance companies; that except for this one reason no night watchman would have been employed. We call Your Honors' attention again to the fact that petitioner has agreed that:

"Walton's services were rendered primarily for the purpose of reducing the fire insurance rates or pre-

miums upon the buildings, machinery and fixtures situated on the premises. *Except for the reduction obtained in said insurance rates, a night watchman would not have been employed.*"

We call Your Honors' attention to the fact that petitioner here has agreed that Walton's services:

"WERE NOT NECESSARY NOR USED IN CONNECTION WITH THE ACTUAL PRODUCTION OF VENEER OR OTHER TIMBER PRODUCTS for shipment in interstate commerce; and said Walton performed no service in connection with the actual manufacture of veneer or other production."

Thus, we respectfully submit that the petitioner has agreed that the work of Walton was not an essential part of the production of lumber or veneer.

We can readily understand that in many plants engaged in the production of goods for commerce a night watchman would be essential. This would depend upon the nature and kind of production, the type of plant, etc. Here, it is not only agreed that the employer did not need a watchman at this particular plant and only hired one to save money on insurance premiums, but no facts whatsoever are present in the record which would show or tend to show that this particular plant of respondent needed the services of a night watchman. Petitioner throughout her brief has stated that the duties of Walton were "to guard and protect respondent's plant." There is no justification for such a statement in the agreed statement of facts. There is not one iota of evidence before this Court that respondent's plant was of such a type or nature that it needed guarding and protecting by a night watchman. On the other hand there is the agreement to the contrary. Upon this question, the Supreme Court of Mississippi, in its opinion in this case said:

"However, a recovery has been allowed in other cases on the ground that it was the duty of the night watch-

man to guard the materials, intended for interstate commerce, while stored on the yard, and when loaded in freight cars or otherwise awaiting shipment. *S. H. Robinson & Co. v. LaRue*, Tenn. 1941, 156 S. W. (2d) 432, affirming 156 S. W. 359. But none of the cases, *supra*, are controlling in the instant case, because the agreed statement of facts is entirely silent as to whether the duties of the employee, Fred Walton, related to guarding and protecting any goods assembled for manufacture or awaiting shipment in interstate commerce at the plant in question. Since it is agreed that he was employed only to enable the employer to obtain reduced insurance rates or premiums 'upon the building, machinery, and fixtures situated on said premises' we must assume, for the purpose of this decision, that his duties did not involve the guarding and protecting of the goods for shipment in interstate commerce, as we are not warranted in enlarging upon the agreed statement of facts so as to include a factor not covered by such agreement."

The burden of proof was upon the petitioner here to prove that Fred Walton while acting as night watchman was engaged in an occupation necessary or essential to the production of the lumber and veneer. *Warren-Bradshaw Drilling Co. v. O. V. Hall*, 87 L. Ed. (Adv. Sheet) pg. 99, 317 U. S. —; *Rogers v. Glazer*, 32 F. Supp. 990; *Baggett v. Henry-Fisher Packing Co.*, 37 F. Supp. 670; *New Amsterdam Cas. Co. v. State Industrial Comm.* (Okla.) 193 Pac. 974. Therefore, if the services of a night watchman were essential to the successful operation of respondent's veneer plant, the burden was upon the petitioner to so prove. The record is entirely silent as to whether or not the buildings were of such type as to make the possibility of fire a hazard reasonably requiring the employment of a night watchman. The record is entirely silent as to whether or not there was in and about respondent's plant any substantial amount of products, tools, equipment, etc. as to make the employment of a night watchman reasonably essential to prevent

theft. The type of production produced, i. e., lumber and veneer would not lend itself to theft. The record is entirely silent as to whether or not any sizable amount of products were kept or assembled in and about the plant so as to make reasonably essential the employment of a night watchman. Lumber and veneer will, of course, burn but the record is entirely silent as to whether or not there was ever any sizable amount of these products kept in and about the plant. For all that can be told from this record respondent's plant may have been practically fire-proof. As far as can be told from this record, there were usually and customarily no fire or theft hazards in and about respondent's plant, making essential the services of a night watchman to guard and protect the plant. The burden of proof to so prove was upon petitioner. Petitioner has entirely failed in sustaining this burden and in addition to the absolute failure on the part of petitioner to prove that the services of a night watchman were essential or even beneficial to the production of the lumber or veneer, there is the agreement that a night watchman would not have been employed except to reduce fire insurance premiums and that the services of a night watchman were not necessary to the actual production of the timber products.

As we have stated, we are quite ready to agree that the services of a night watchman are necessary for the operation of many concerns engaged in the production of goods for commerce. We, also, submit that in many businesses engaged in the production of goods for commerce the services of a night watchman are not essential. We are therefore not surprised to find that there are many cases involving the applicability of the Fair Labor Standards Act to night watchman holding that the particular night watchman there involved came under the provisions of the act and, also, at the same time many cases holding that the duties of the particular watchman involved and the ne-

cessity for the watchman would not bring him within the act.

This Court has held that cases under the Federal Employer's Liability Act are applicable and in point in a construction of the Fair Labor Standards Act. *McLeod v. Threlheld*, decided Oct. 19, 1942, 87 L. Ed. (Adv. Sheet) 1154; *Overstreet v. North Shore Corp.*, decided Feb. 1st, 1943, 87 L. Ed. (Adv. Sheet) 423.

In cases interpreting the Federal Employer's Liability Act and in determining whether or not a particular employee came within the act we also find some to the effect that certain particular watchmen with certain definite duties were within the act and others holding that other watchmen with other duties and under other circumstances were not within the act. The cases are not in conflict. The test was whether or not the individual night watchman involved in that particular case was performing duties sufficiently intimately connected with and essential to the interstate commerce activity as that they themselves could be said to be engaged in interstate commerce. For cases holding night watchmen at plants and employed by businesses engaged in interstate commerce were not within the Federal Employer's Liability Act, see *New York Central R. R. Co. v. White*, 243 U. S. 188, 61 L. Ed. 667, 37 S. Ct. Rep. 247; *Feaster v. Southern Railway Co.* (C. C. A. 4), 15 F. (2d) 540; *Delaware, etc., Ry. Co. v. Scales* (C. C. A. 2), 18 F. (2d) 73; *Southern Railway Co. v. Varnell* (Ala.), 131 So. 803, Writ of Cert. denied 283 U. S. 852, 75 L. Ed. 1460, 51 Sup. Ct. 561; *Hardy v. Atl., etc., Ry. Co.* (Ga.), 93 S. E. 18; *Wabash etc., R. Co. v. Industrial Comm.* (Ill.), 121 N. E. 569.

Turning to cases deciding the applicability of the Fair Labor Standards Act to night watchmen, we find that in practically every reported case where a watchman was held to be within the act, such employee was charged with additional duties beyond those performed by the one Walton

here of such importance as to make the watchman's services reasonably essential to the production of goods in commerce. The Supreme Court of the State of Mississippi in its opinion in this case discussed this question as follows:

"It was also agreed that the plant did not operate at night during the period of Walton's employment, and that the defendant corporation was not engaged at night in the production of goods for interstate commerce while he was on duty; that when fires were kept under the boilers in said plant at night, it was done by a fireman kept on duty for that purpose, and that when repairs were made occasionally at night to the machinery, such work was done by employees other than the said Walton—a stipulation which distinguishes the case from that of *Hart v. Gregory*, 248 N. C. 184, 10 S. E. (2d) 644, 130 A. L. R. 265, wherein the court allowed recovery under the Act by a night watchman who was required to pump the boilers up at night to keep the water in them as long as the steam was up so they would not get dry, and where the Court said: 'The present case we think comes within the provisions of the Fair Labor Standards Act, as the duties of this night watchman were more than ordinarily required of one so termed. The duty of plaintiff was to keep water in the boiler so that in the morning steam could easily be available. If the boilers were not kept filled up at night, they would have burned dry and that would have ruined them and made them unfit for use' (R. 7-8).

"It was held in the case of *Hart v. Gregory*, *supra*, as heretofore indicated that a night watchman whose duties also include the pumping of water into boilers, so that they will not burn dry and be ruined, but will be fit for service when production starts the next day, is engaged in an 'occupation necessary to the production' of goods within the meaning of the Act here under consideration. In the course of its opinion, the Court

made the observation, italicizing its language, that it was necessary to have those boilers filled up with water and if they had not been kept filled up at night they would have burned dry and that would have ruined the boilers.' The decision discloses that the turning point in the case entitling the night watchman to the benefits of the Act was the fact that he had these other duties to perform in addition to his regular duties as a night watchman. After this case was remanded it was again tried, and on conflicting evidence the question was submitted to the jury as to whether the night watchman actually performed the services other than nightwatching, as claimed and the jury decided this issue in the negative, and upon the second appeal the judgment denying liability was affirmed. 220 N. C. 180, 16 S. E. (2d) 835; Vol. 1, Wage & Hour Cases, 1172. (R. 9-10).

While it is true that there are a few cases holding a night watchman within the terms of the Fair Labor Standards Act where no great emphasis is placed upon any duties upon the night watchman save to "*protect and guard*" the goods or plant of the employer, in each of these cases it affirmatively appears that there was need for a night watchman to protect and guard the products and that the services of the night watchman were, therefore, essential to the protection of goods in commerce. In the *Kirschbaum Case*, *supra*, this Court affirmatively stated that the maintenance of a safe, habitable building was indispensable to the production of goods in interstate commerce and that the services of the employees there were essential for the maintenance of a safe, habitable building. There, the services of a night watchman were shown to be an essential part of the maintenance of a safe building. Here, this has not been proved. All of the authorities relied upon by petitioner holding that a night watchman came under the terms of the Fair Labor Standards Act can be distinguished upon

the ground that either (1) the night watchman involved had additional duties closely connected with the actual production of goods for commerce, or (2) that the services of a night watchman in that particular business were proved to be essential for the guarding and preservation of the plant or products.

We refer Your Honors to the case of *Rogers v. Glazer* (D. C. Mo.), 32 F. Supp. 900. In that case the employee was a watchman in a business engaged in buying old automobiles which were dismantled, the parts being sold and the scrap metal being sold and passing into interstate commerce. The court indicated that some employees of this business, depending upon the nature of their duties, might be considered as engaged in an occupation necessary to the production of goods for commerce, but Judge Otis in holding that the watchman had not been proved to be essential to the successful carrying on of the business said:

"Our question then comes down to this question: Was the plaintiff an employee who was engaged in the production of goods for commerce? Well, now, he certainly was not engaged in the production of goods in the literal sense of the word production. Nobody has contended he was. He was a watchman. It was his business to protect from depredations by thieves this business enterprise and the property of the defendants on the site of the place of business. I think it can be truly said from the evidence that the only property that had any real value, which needed any protection from thieves, was the parts which the defendants were engaged in selling. The scrap that remained when the parts were removed from automobiles which has been bought, in the first place was of comparatively small value, and in the second place, it was extremely difficult for thieves to carry it away.

"I do not think that it can be said that a watchman for such an establishment as the defendants maintain, a part of whose duty it may be said—a very small part of whose duty was to watch the pile of scrap iron on the premises, I do not think that it can be said that he is engaged in an occupation *necessary* to the production of goods. Perhaps I may be giving too literal an interpretation to the word "necessary". Certainly it is not *necessary* to the production of goods that there should be a watchman at all. In many yards scrap is assembled and sold without any watchman and I do not think that it can be said that a watchman *produces* goods. He may do that which is helpful to the business, he may help to produce the profits that arise from the business. He does not produce the goods. I do not think I could make my position clearer on that if I were talk an hour about it."

The drilling of oil wells for production of oil which goes into interstate commerce has been held to be a business involving commerce. In *Brown v. Carter Drilling Co.* (D. C. Tex.), 38 F. Supp. 489, the court held that a particular watchman employed by a drilling company was not such an employee whose services were essential to the production of goods in commerce. The court used the following language:

"Plaintiff insists that the Fair Labor Standards Act of 1938 should be liberally construed. An Act of Congress which prohibits the making of contracts of employment between an employer and employee, except in accordance with such Act, and which imposes heavy and severe penalties in the way of damages on the employer for violation of such Act, and permits the employee to have and recover such penalties, it may be should be liberally construed, but I doubt it. Certainly the evidence offered by an employee such as is plaintiff who has long since received and accepted without protest the pay called for in his contract of employment, and who after long delay, and without

any reasonable explanation of the delay, sues to recover compensation for overtime and penalties, should be convincing, both as to whether such employee is working in commerce and as to the terms of his employment.

“ * * * Plaintiff was not employed to help in drilling of wells, nor as a watchman during the drilling of wells, nor as a watchman on a productive well, but only as a watchman on an idle drilling rig, or part of an idle drilling rig, between the time defendant finished drilling one well until he was able to find a customer and make a contract to drill, and begin drilling, another well. I am convinced that it was not the intention of Congress to bring an employee such as was plaintiff under the provisions of the Act.”

We call Your Honors' attention to *Jewel Tea Co. v. Williams* (C. C. A. 10) 118 F. (2d) 202, holding that the act “does not extend to employment that merely affects interstate commerce.” And to the same effect is a case of *Chapman v. Home Ice Co.* (D. C.), 43 F. Supp. 424, holding the act does not apply to employees whose duties merely “affect interstate commerce.”

We, also, call Your Honors' attention to the following cases: *Hart v. Gregory*, 220 N. C. 180, 16 S. E. 837; *Rogers v. Glazer*, 32 Fed. Supp. 990; *Brown v. Bailey*, 177 Tenn. 185, 145 S. W. 2d 105; *Brown v. Carter Drilling Co.*, 38 F. Supp. 489; *Dotson v. Stowers*, 37 Fed. Supp. 937; *Bowman v. Pace Company*, 119 F. 2d 858.

We respectfully submit that petitioner here has not sustained her burden of proving that the services of Walton here had, in the language of this Court, “such a close and immediate tie with the process of production for commerce, and was, therefore, so much an essential part of it” that he could be regarded as being engaged in an occupation “necessary to the production of goods for commerce.”

Congress has used the word "necessary," and we submit that the terms "convenient," "desirable," or even "customary," should not be substituted for the language used by Congress. We submit that in the case of *Kirschbaum v. Walling, supra*, the Court extended the act of interpretation to the utmost confines, and that the Court will not further broaden the act by its interpretation so as to include employees whose services are at the utmost desirable and convenient, and also convenient and desirable for a purpose entirely disconnected from the production of goods for commerce.

We, therefore, respectfully submit that this case should be affirmed by this Court.

POINT B.

This is an action for a penalty and is barred by Section 2301, Miss. 1930 Code, requiring that actions for penalties be commenced within one year next after the offense was committed and not after.

It is well settled that this action would be controlled by the applicable statute of limitation of the State of Mississippi. See *Wilkinson v. Swift & Co.* (U. S. D. C. N. Texas, 1941), Vol. 1, Wage and Hour Cases, 604; *Cline v. Super-Cold S. H. Co.* (U. S. D. C. N. Texas, 1941), 1 W. H. Cases, 777; *Klotz v. Appolito* (U. S. D. C. S. Texas, 1941), 40 Fed. Supp. 422; *Littleton v. White Motor Company* (U. S. D. C. N. Texas, 1941), 1 W. H. Cases 914; *Duncan v. Montgomery Ward & Co., Inc.* (U. S. D. C. S. Texas, 1941), 42 Fed. Supp. 879; *Owen v. Liquid Carbonic Corporation* (U. S. D. C. S. Texas, 1941), 42 Fed. Supp. 774; *Collins v. Hancock* (La. First Judicial District Court, 1941), 1 W. H. Cases 1117.

Petitioner in her brief does not question this principal of law and; therefore, it stands admitted that any statute

of the State of Mississippi prescribing limitations upon the bringing of such an action would control.

The Mississippi statute applicable is Section 2301, which reads as follows:

“2301. Action for penalty commenced in one year.— All actions and suits for any penalty or forfeiture on any penal statute, brought by any person to whom the penalty or forfeiture is given, in whole or in part, shall be commenced within one year next after the offense was committed and not after.”

The most recent construction of this statute is that of *State for Use of Rogers v. Newton*, 191 Miss. 611, 3 So. (2d) 816. This case involved Section 14 of Chap. 255 of the Laws of 1936, providing that if any County superintendent of education issued certificates illegally or in excess of the amount of the budget provisions, that the County superintendent and his bondsmen were liable to the holders of such certificates for the face value thereof. The Court, speaking through Chief Justice Smith, said in part:

“On a former appeal herein, *National Surety Corporation et al. v. State for Use of Rogers*, 189 Miss. 540, 198 So. 299, 302, one of the questions presented was whether Mrs. Rogers had the right to sue on the certificates. The appellant's contention there was that the liability imposed by the statute is a penalty and therefore the right to recover it is not assignable. The court held that it is a penalty and not assignable under the general law, but that the statute itself confers the right upon any holder of any such pay certificates to sue thereon. This liability imposed by the statute was there referred to five separate times as a ‘penalty’. On return of the case to the court below, the appellees plead the limitation of Section 2301, Code of 1930, which provides that:

“All actions and suits for any penalty or forfeiture on any penal statute, brought by any person to whom

the penalty or forfeiture is given, in whole or in part, shall be commenced within one year next after the offense was committed, and not after.'

'The Court, as it should have done, followed our former opinion and held that the liability here imposed on the superintendent to be a penalty, and, therefore, as more than a year had elapsed since the cause of action accrued, it was barred by limitation.

'Leaving out of view the law of the case rule and expressing no opinion as to its applicability vel non here, the question presented is whether this Court should now depart from its holding on the former appeal herein and hold this liability not to be a penalty. We shall assume, though the fact may be otherwise, that the words 'penalty' and 'forfeiture' are used in Section 2301, Code of 1930, as being synonymous and interchangeable.

'In our opinion on the former appeal herein, to which we adhere, it was said that 'this statute is highly penal'. An examination of the statute discloses that this is in accord with the legislative intent. Its sanctions are designated as penalties in its title, which sets forth that its purpose, among other things, is 'to regulate the expenditure of school funds in the several counties and separate school districts; to restrict the amount of such expenditures to amount of revenue available thereof; and to provide penalties for violations of the provisions of this act.' Two penalties are imposed by Section 14 of the Act on County superintendents of education to punish them for, and to deter them from, violating the Section: '(1) Payment of the face value of pay certificates wrongfully issued; and (2) fine and imprisonment or both for the violation of any of the provisions of the section. That the first is not payable to the State, but to the holder of the certificate does not take it out of the penal category. *Bank of Hickory v. May*, 119 Miss. 239, 80 So. 704; 59 C. J. 11; 25 C. J. 1149, 1178. This fact is recognized by Section 2301 of the Code hereinbefore set out, which applied only to penalties and forfeitures payable to

individuals. But, it is said that this provision of the statute is remedial and not penal. The title of the statute, in this connection, refers only to penalties and does not remotely indicate that any of its provisions are simply remedial. But that aside, a remedial statute is one that cures defects in, or enlarges or abridges the scope of, a former law. 1 Blackstone's Com. 86; 59 C. J. 1106; 25 R. C. 765. E.G., a statute that grants a theretofore non-existent remedy for a wrong inflicted. Metzger et al. v. Joseph, 111 Miss. 385, 71 So. 645. *A statute that makes a wrong-doer liable to the person wronged for a fixed sum without reference to the damage inflicted by the commission of the wrong is penal.* Bank of Hickory v. May, supra; Gulf & S. I. R. Co. v. Laurel, etc., Co., 172 Miss. 630, 158 So. 778; 159 So. 838; 160 So. 564; O'Sullivan v. Felix, 233 U. S. 318, 34 S. Ct. 596, 58 L. Ed. 980; 25 C. J. 1178, Sec. 72.

When tested by these rules, it will appear that this provision of Section 14, Chapter 255, Laws of 1936, is not remedial but imposes a penalty.

* * * The liability imposed is not for wrongfully employing a teacher or carrier, but for issuing to him a pay certificate without the issuance of which the statute imposes no liability on the superintendent to the teacher or carrier. *Bearing in mind that the issuance of this certificate of itself inflicts no injury on the school teacher or carrier, it will readily be seen that the liability here imposed is for a fixed sum to be paid whether injury has been inflicted or not on the teacher or carrier by the issuance of the pay certificate, or on any holder thereof.*

Similarly, here, it is admitted that the failure to pay overtime to Walton inflicted no injury on Walton. There appears in the agreed statement of facts (R. 2-3) the following:

(3) That during the period of time that Fred Walton was employed by the defendant, he was paid for his services the amount that defendant contracted

to pay him, which amount is agreed upon as the actual value of said services.

"(4) That the defendant's witnesses if present in Court would testify that the amount that Fred Walton was paid for his services was more than said Fred Walton could have obtained from any other employment during the period of time that he was employed by the defendant, and that the attorney of said plaintiff has no way of disproving said testimony, but object to the same on the ground that such testimony is inadmissible. * * *

"(7) That the defendant could have employed more than one person to perform said services at the same rate of pay per hour as was paid to said Fred Walton, and no overtime would have accrued, and that the defendant has in no wise profited by the use of one employee as a night watchman instead of dividing said employment among two employees. If Fred Walton had not accepted his pay without protest, defendant would have employed two night watchmen and no overtime would have accrued. That Fred Walton requested said employment with full knowledge of his pay and of the hours of employment and accepted his pay at the rate agreed upon and did not complain or protest at his rate of pay nor the hours worked during the period of his employment nor afterwards prior to the filing of the suit."

There is thus imposed by this statute a liability to the employee for a fixed sum to be paid whether injury was inflicted or not.

Also, in this connection, we call the court's attention to the fact that the very heading adopted by Congress for Section 216, is "Penalty; Civil and Criminal Liability".

Counsel for plaintiff have cited quite a few cases in which it is contended that the courts have decided that the civil

provisions of Section 216 are not penalties. However, these cases are based upon the question of the jurisdiction of the court and more especially as to whether a state court would have jurisdiction. Congress had previously reserved jurisdiction to the Federal Court of all cases to enforce federal penalties, 28 U. S. C. A., Secs. 780 and 788. By specifically providing in Sec. 216 of 29 U. S. C. A. that action under the Wage and Hour Law might be heard in either a federal or a state court, it necessarily conferred jurisdiction upon the state court to hear such causes, regardless of whether the same be a penalty or not. Therefore, it is not necessary to determine whether a penalty is provided for in Section 216 in determining the jurisdiction of the Court. Congress had the authority to confer jurisdiction upon the state court in matters of this kind whether it be a penalty or not, and Congress has said that such jurisdiction is conferred, and therefore decisions dealing with the question of penalties in jurisdictional matters is merely dicta and not necessary to the decision of the questions involved.

See *Stringer v. Griffin Grocery Co.* (Tex.), 149 S. W. (2d) 158; *Adair v. Traco Division* (Ga.), 14 S. E. (2d) 466.

The question now before this Court is not whether or not the provisions of the Fair Labor Standards Act constitute a penalty in the sense that jurisdiction would be exclusive in the federal court but the question is whether it constitutes a penalty under Sec. 2301, Miss. 1930 Code. The precise question presented is the construction of Sec. 2301, Miss. 1930 Code.

The term "penalty" is a very elastic term and has been given various and sundry meaning, depending upon the sense in which the same has been used. The term "penalty" in some contexts has been defined or construed in the limited sense of "a punishment accruing to the state"; or in the slightly less limited sense of "an amount accruing

to an individual but being in reality a punishment by the government."

We respectfully submit that the Supreme Court of Mississippi in construing its own statute, Sec. 2301, has construed the word "penalty" in that statute as including "liability imposed by way of compensation as well as punishment," if the liability imposed as compensation to the individual is a fixed sum without reference to the damage actually inflicted by the commission of the wrong. While this Court in *Overnight Transportation Co. v. Missel*, 86 L. Ed. 1683, 316 U. S. 572, 62 S. Ct. 1216, interpreted the Fair Labor Standards Act as imposing a liability by way of compensation, rather than punishment by the government, this Court did not attempt there to construe the meaning of the word "penalty" in Sec. 2301, Miss. 1930 Code. We respectfully submit that the Supreme Court of the State of Mississippi has construed its statute and the word "penalty" therein as including such liability as is imposed by the Fair Labor Standards Act. That construction of Sec. 2301 by the Mississippi Supreme Court in *State v. Newton*, *supra*, would, we submit, be conclusive on this Court.

The Federal Courts will follow, in reality, as a part of state statutes, the decisions of the highest court of the State interpreting such statutes. In a very real sense the interpretation of a State statute by the highest court of that state becomes an integral part of the statute. Section 2301, Miss. 1930 Code, differently construed and imposed by the Supreme Court of Mississippi and this court might well become two statutes. Accordingly the general rule is well established that the federal courts feel bound by cases in the state court of last resort in construing the state statute. *Sim v. Edenborn*, 242 U. S. 131, 37 S. Ct. 36, 61 L. Ed. 199; *McGregor v. Hogan*, 263 U. S. 234, 44 S. Ct. 50, 68 L. Ed. 282; *Terrace v. Thompson*, 263 U. S. 197, 44 S. Ct. 15, 68

L. Ed. 255; *General Oil Co. v. Crain*, 209 U. S. 211, 28 S. Ct. 475, 52 L. Ed. 754; *Packing Co. v. Court of Industrial Relations*, 267 U. S. 552, 45 S. Ct. 441, 69 L. Ed. 785; *Kansas City etc. Co. v. Arkansas*, 269 U. S. 148, 46 S. Ct. 59, 70 L. Ed. 204.

Also, as a matter of fact, in an appeal to the Supreme Court of the United States from the Supreme Court of the State of Mississippi, if this Court should reverse the Supreme Court of Mississippi upon the federal question involved, namely the interpretation of the word "necessary" in the Fair Labor Standards Act as applying to the facts in this case, then this Court would remand the case to the Supreme Court of Mississippi for a determination of the state question: the interpretation of the word "penalty" in Section 2301, Miss. 1930 Code. It is thoroughly established that in the exercise of its appellate jurisdiction over the decisions of state courts, this Court will confine its review to the federal question and will not pass upon the non-federal question; but, if the judgment of the state court is reversed on the federal ground, it will remand the case to the state court for further proceedings and this Court will not interfere with such subsequent proceedings in the state court if a decision therein is not then based on federal grounds. *Snyder Granite Co. v. Gast Realty & Inv. Co.*, 245 U. S. 288, 38 S. Ct. 125, 62 L. Ed. 292; *Missouri, etc. v. Dockery*, 191 U. S. 165, 24 S. Ct. 53, 48 L. Ed. 133; *Railroad Co. v. White*, 238 U. S. 507, 35 S. Ct. 865, 59 L. Ed. 1433.

We, therefore, respectfully submit that should this Court determine that the Supreme Court of the State of Mississippi was in error in its interpretation of the Fair Labor Standards Act, that it will then reverse this cause and remand the same to the state court for a construction therein by the state court of the word "penalty" in Sec. 2301, Miss. 1930 Code, i. e., whether or not the word "penalty" therein is sufficiently broad to include the liability

imposed by the Fair Labor Standards Act even though it is imposed as compensation and not as a punishment by the government.

POINT C.

The petitioner here has no cause of action under the Fair Labor Standards Act of 1938, Title 29 U. S. C. A., Section 216(b), in that the employee involved is now deceased and the cause of action would not survive said employee.

The Federal Statute does not provide for Survival of suit under the Wage and Hour Law.

The cause of action sued on exists solely by virtue of the Federal statute, U. S. C. A. 29, Par. 216.

We, therefore, quote this Section in full:

"216. Penalties; civil and criminal liability.

"(a) Any person who willfully violates any of the provisions of section 215 shall upon conviction thereof be subject to a fine or not more than \$10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

"(b) Any employer who violates the provisions of section 206 or section 207 of this chapter shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. *Action to recover such liability* may be maintained in any court of competent jurisdiction *by any one or more employees* for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the

plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. June 25, 1938, Ch. 676, 816, 52 Stat. 1069." (Italics ours.)

It will be noted that the above mentioned section nowhere provides for the survival of the cause of action after the employee's death. There is no other provision either of the Federal Wage and Hour Law or in any other Federal statute providing for the survival of this cause of action. There is no general Federal statute providing for survival of causes of action. Counsel for plaintiff has not insisted that the cause of action survive by virtue of either the Federal statute on Wage and Hours, and any other Federal statute.

Also, see 25 C. J., p. 220. The statute having expressly enumerated the persons who could "maintain" the cause of action created solely by an existence of the statute this enumeration would have the effect of preventing the maintenance of such a suit by anyone else. Such an action can be maintained only by an employee or his designated agent.

Assuming the Federal Statute to be silent as to survival, the Common Law as it existed at the time of its adoption in America would control.

Counsel for the plaintiff states the above mentioned rule in the following language:

"The general rule is that a cause of action given by a federal statute, if no specific provision is made by act of Congress for its survival, survives or not according to the principles of the common law existing in England at the time of the formation of the Union."

We are inclined to agree with the foregoing statement of the rule.

However, in applying the rule, counsel for the plaintiff has overlooked the recent decision of *Erie v. Tompkins*.

304 U. S., p. 64, 82 L. Ed., p. 1188, in which Judge Brandeis says, "there is no federal general common law," and expressly overruled *Swift v. Tyson*, 16 Peters, p. 1, 10 L. Ed 856, and the cases following this.

The Mississippi statute with reference to survival in Sections 1712-14, Code of 1930, would have no application. This is correctly stated by counsel for the plaintiff who cites the case of *Schrieber v. Sharpless*, 28 L. Ed. 65. We have examined this case very carefully and find that it holds that the survival of the cause of action under the Federal statute depends upon the common law as of the formation of the Union, and that a statute on survival of actions subsequently adopted by one of the States has no application. Of course, the Mississippi statute was adopted to relieve parties from the rigor of the common law with respect to survival of causes of action, and the statute permits the survival of many causes of action that did not survive under the common law, as it existed at the time of the formation of the Union.

This Cause of action arises out of an alleged tort and is not a suit for breach of contract.

Plaintiff's counsel insists that the suit is for breach of a contract. The only authority cited in support of this view is the case of *Cole v. Harker* (W. D. Tenn.). Although this case is alleged to have been decided October 10, 1939, counsel states in his brief that it is "not yet reported". Since October 10, 1939, there have been approximately eleven columns of the Federal Supplement published, and if this case has not yet been reported, it is very unlikely that it ever will be reported. We also have made a careful search of the reported cases and are unable to locate whether this case has been reported, and naturally would be unable to comment upon what the case held on the soundness of the

reasoning supporting the same. At any rate, it was a decision of a "one man court" and evidently was not regarded as being of sufficient importance to justify it being incorporated in the reports.

In the case of *Turner v. Clickstein & Turner, Inc.*, 283 N. Y. 299, 28 N. E. 2d 846 (N. Y., 1940), the Appellate Court of the State of New York, in dealing with a suit under the Fair Labor Standards Act for additional wages and overtime, held that the jurisdiction was in a court of law and not equity, and that the nature of the action was that of a tort and not a breach of a contract, using the following language:

"The primary right arises from a tort and the right of action is not dependent upon any equitable feature or incident. (Pomeroy's Eq. Juris. (4th Ed.), p. 178). Under such conditions, an action in equity will not lie" (Italics ours).

The theory that the law becomes a part of the contract has been definitely discarded in the case of *St. John v. Brown et al.*, (N. D. Texas, Fort Worth Division, March 28, 1941) 38 Fed. Supp. 385, wherein the following language was used:

*"Though this law was in effect, the employment contract was made without reference to it. * * * Here, extra pay for overtime is a thing the law demands. Whatever that per hour contractual rate is figured to be is the rate Congress had in mind when it said, 'not less than one and one-half times the regular rate at which he is employed.' The law did not become a part of these contracts. * * *. The law exacts certain things and forbids others, and fixes civil and criminal penalties for its violation. Even the 'one and one-half times' provision is akin to a penalty, intended to discourage overtime employment and to encourage a greater spread of employment. * * * (Italics ours.)"*

Cause of Action Does Not Survive under Common Law.

Under the common law as it originally existed the general rule was that causes of action based upon a contract would survive, but that causes of action based upon a tort would not survive. In order to broaden this rule the statute of 4 Edward III, Chapter 7, was enacted. This statute and its effect is stated in the case of *Moore v. Backus*, 78 F. 2d 571 (572), in the following language:

"For many centuries the maxim *actio personalis moritur cum persona* applied to all tort actions. In the fourteenth century, however, the English statute of 4 Edward III, Chapter 7, was enacted, which limited and became a part of the common law. That statute is the basis of this controversy and reads as follows:

"Whereas in times past executors have not had actions for the trespass done to their testators, as of the goods and chattels of the same testators carried away in their life, and so such trespasses have hitherto remained unpunished; it is enacted that the executors in such cases shall have an action against the trespassers to recover damages in like manner as they, whose executors they be, should have had if they were in life' (Quoted in Pollock on Torts (11th Ed.), p. 66)."

There was no other statute enacted in England relating to the subject of survival of causes of action prior to the formation of the American Union.

It will be noted that the foregoing statute was intended to apply primarily to suits for conversion of specific, tangible personal property wherein the estate of the decedent had been damaged and that of the defendant enriched.

The early decisions under the common law were thoroughly reviewed in the cause of *Sullivan v. Associated Bill*

Pasters etc., 6 F. 2d 1000 (1004, 1007), in the following language:

"It was a rule of the common law that most causes of action based on contract survived; while most of those founded on tort abated. But the rule was subject to various exceptions. The real test, so far as tort actions were concerned, seems to have been whether the injury on which the cause of action was based affected property rights, or affected the person alone. In the former case the cause of action survived, while in the latter it abated. See 21 Encyc. of Pl. & Pr. 31. The common-law rule, as laid down in 3 Blackstone's Comm. 302, is as follows:

" * * * The death of either party is at once an abatement of the suit. And in actions merely personal, arising *ex delicto* (from wrong done), for wrongs actually done or committed by the defendant, as trespass, battery, and slander, the rule is that *actio personalis moritur cum persona* (a personal action dies with the person); and it shall never be revived either by or against the executors or other representatives. For neither the executors of the plaintiff have received, nor those of the defendant have committed, in their own personal capacity, any manner of wrong or injury."

"In *Hambley v. Trott*, Comp. 371, 376, which was decided in 1776, Lord Mansfield, discussing the maxim above quoted, declared that it was not generally true and much less universally so. The question in that case was whether an action of trover could be maintained against an executor for a conversion by his testator. The case was twice argued before the Court, and at its conclusion it was said: '*Cur. advisari vult.*' On a subsequent day Lord Mansfield delivered the unanimous opinion of the court, in which he said:

"Here therefore is a fundamental distinction. If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as being

or imprisoning a man, etc., there the person injured has only a reparation for the delictum in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As, for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value of sale of the trees he shall. So far as the tort itself goes, an executor shall not be liable; and therefore, it is that all public and all private crimes die with the offender, and the executor is not chargeable; but, so far as the act of the offender is beneficial, his assets ought to be answerable, and his executor therefore shall be charged."

If "specific property" is acquired, the court held the cause of action survives; if otherwise, the court held that it does not.

In 1 C. J. 185, it is said:

"In order that a right of action arising out of a tort should survive against the executor or administrator of the tort-feasor, it was generally held essential that the latter should, by the wrongful act, have acquired specific property by which, or by the proceeds of which, the assets in the hands of his personal representatives were increased." It was not enough that the benefit resulted or that expense was saved to the tort-feasor by which his estate was larger than it otherwise would have been."

In the case now before the court it does not appear that the deceased defendant has in his estate any of the plaintiff's property. Assuming as we must the allegations of the complaint to be true, they amount to a claim that the estate of the defendant has been increased by profits made by the defendants wrongfully diverted from the plaintiff. So far as the injury done to property is concerned,

it is indirect and consequential, and, the action being ex delicto, under the foregoing authorities it would not survive against the personal representatives. And even if it were shown that one's property was actually diminished, and not merely that he was prevented from increasing it by gains he otherwise would have made, the action would not survive. For the test of survivability does not turn on the fact that one's estate has been diminished. Thus in *Henshaw v. Miller*, 58 U. S. 211, 15 L. Ed. 222, it was held an action brought to recover damages for fraudulently recommending a third party as worthy of credit whereby financial loss resulted and one's estate was diminished did not survive, either at common law or under the statute of Virginia.

"The entire theory of the Wagner Act prohibiting the issuance, except in certain instances, of injunctions in restraining orders by the Federal Court in labor disputes is based upon the theory that labor is not property and that a labor contract is not an article of commerce. As stated in the case of *Sullivan v. Associated Bill Posters, etc.*, 6 F. 2d 1000 (1012):

*** they did not diminish the plaintiff's 'property' which was something already acquired. That which it hoped to acquire, but had not yet obtained, certainly did not constitute its 'property' within the meaning of the statute, and so did not survive."

Cause of action does not survive under Mississippi decisions.

We have heretofore called attention to the fact that the Mississippi statutes on this subject have no application. These statutes were passed to increase the kinds of action that would survive under the common law, and the fact that the statutes have no application militates against the theory

of survival instead of assisting it. Prior to the adoption of the statute causes for personal injury did not survive.

However, under the Mississippi decisions, special attention is called to the case of *McNeely v. City of Natchez*, 148 Miss. 268, 114 So. 484, holding that a cause of action for a penalty for failure to secure a franchise from the City of Natchez to operate a ferry did not survive; and the case of *Catchings v. Hartman*, 178 Miss. 672, 174 So. 553, holding that cause of action for libel and slander did not survive the death of the plaintiff.

The *McNeely* case very clearly holds that a cause of action for a penalty does not survive. In a subsequent division of this brief, we deal with the question of whether or not the alleged benefits constituted a penalty and will not attempt to go into that question at this time as it would constitute repetition.

The *McNeely* case and *Catchings* case are interesting only in that they indicate that the courts of this state have not been inclined to expand the common law on the subject of a survival of causes of actions. We quote from the case of *Catchings v. Hartman*, *supra*, as follows:

"(1, 2) It is conceded, as it must be, that common law causes of action for slander or libel do not survive the death of either the wrongdoer or the person injured, wherefore, if they be any such survival, it must be by force of a sufficient statute. The question, therefore, is whether an action of slander is within the term 'personal action' as used in the above-quoted statute. In *McNeely v. City of Natchez*, 148 Miss. 268, 274, 114 So. 484, 487, it was held that this statute, being in derogation of the common law, must be strictly construed, and that the term 'personal action' must be interpreted according to its strictly technical meaning; and the court thereupon, so interpreting the meaning, held that a personal action, under the said statute, is one brought

for the recovery of personal property, for the enforcement of some contract or to recover damages for its breach, or for the recovery of damages for the commission of an injury to the person or property."

We respectfully submit that the judgment appealed from should be affirmed.

Respectfully submitted,

W. S. HENLEY,
W. M. H. WATKINS, SR.,
P. H. EAGER, JR.,
MRS. ELIZABETH HULEN,
Attorneys for Respondent.

HENLEY, JONES & WOODLIFF,
Hazlehurst, Mississippi;
WATKINS & EAGER,
Jackson, Mississippi;
Of Counsel for Respondent.

FILE NO.



John Edgar Hoover in World War

October 1941

Mrs. John Edgar Hoover, Administrative Director of the
Bureau of Investigation, Department of Justice

Department of Justice, Washington, D.C.

IN TESTIMONY WHEREOF, I have hereunto set my hand and
the seal of the Department of Justice at Washington, D.C.

RECORDED FOR THE ADMINISTRATION OF THE WAR
AND POST-WAR UNITED STATES DEPARTMENT OF
LABOR, AS ORDERED.

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 159

MRS. EULA MAY WALTON, ADMINISTRATRIX OF THE
ESTATE OF FRED WALTON, DECEASED, PETITIONER

SOUTHERN PACKAGE CORPORATION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME
COURT OF MISSISSIPPI*

MEMORANDUM FOR THE ADMINISTRATOR OF THE WAGE
AND HOUR DIVISION, UNITED STATES DEPARTMENT OF
LABOR AS AMICUS CURIAE

This suit was brought to recover overtime compensation, liquidated damages, and attorney's fees under the Fair Labor Standard Act. The employee was a night watchman in a plant engaged in the manufacture of lumber and veneer products, a substantial portion of which was shipped in interstate commerce. The court below reversed a judgment for the employee on the ground that he was not engaged in an occupation necessary to the

2

production of goods for interstate commerce. 11 So. (2d) 912.

The decision below is in direct conflict with this Court's decision in *Kirschbaum Co. v. Walling*, 316 U. S. 517, and, unless this Court should desire to determine the other questions raised by respondent, should, it is submitted, be reversed and remanded on the petition for certiorari without argument. The court below refers at some length to the opinion of this Court in the *Kirschbaum* case and appears to reject its reasoning. 11 So. (2d), at 917-918). Its decision, however, is placed upon the supposed distinction that in this case a night watchman was involved, whereas in other cases holding watchmen covered, they "were in each instance, almost without exception, at least on duty while such goods were being produced, or were employed specially to guard the goods while awaiting shipment" (11 So. (2d), at 918). The record and this Court's opinion in *Kirschbaum* negate any such distinction. The employees involved in *Kirschbaum* included a night watchman. (*Kirschbaum* record, p. 63). In describing their duties the Court said, "The watchmen protect the buildings from fire and theft" (316 U. S., at 519). Coverage was predicated upon the

Respondent has also raised questions as to the survivorship of the cause of action and the statute of limitations, but the court below found it unnecessary to pass upon these points. This memorandum is concerned only with the question of coverage.

theory that "maintenance of a safe, habitable building is indispensable to" the production of goods for interstate commerce (316 U. S., at 524). The facts of the instant case fall squarely within this rationale. The watchman was employed "for the purpose of reporting any fires and trespassers" (11 So. (2d), at 912). And even if his duties related only to the protection of the plant rather than the goods produced (11 So. (2d), at 915), he was engaged in maintaining a building so that production could be carried on. The fact that this protection is afforded at night, when the need for it may be greater, is hardly a basis for denying coverage. Cf. *Bowie v. Gonzales*, 117 F. (2d) 11, 20 (C. C. A. 1), where employees engaged in repair and maintenance of sugar mills in the dead season were held covered.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

DOUGLAS B. MAGGS,
Solicitor,

IRVING J. LEVY,
Associate Solicitor,
United States Department of Labor.

SEPTEMBER 1943.

In the *Kirschbaum* case, the watchman was the employee of the owner of the building, not of an employer producing for commerce. In the instant case, partitioner's employer itself manufactures and ships in interstate commerce.

FILE COPY



No. 100

In the Supreme Court of the United States

October Term, 1943

**MRS. EULA MAY WALTON, ADMINISTRATRIX OF THE
ESTATE OF FRED WALTON, DECEASED, PETITIONER**

SOUTHERN PACKAGING CORPORATION, RESPONDENT

**ON WRIT OF HABEAS CORPUS TO THE SUPREME COURT OF
MISSISSIPPI**

**BAILEY ON BEHALF OF THE ADMINISTRATOR OF THE WAGE
AND HOUR DIVISION, UNITED STATES DEPARTMENT OF
LABOR, AN AMICUS CURIAE**

INDEX

	Page
Opinion below.....	1
Jurisdiction.....	2
Question presented.....	2
Statute involved.....	2
Statement.....	3
Argument:	
Petitioner's duties as a watchman constituted an "occupa- tion necessary to the production" of goods for commerce within the meaning of the Fair Labor Standards Act.....	4
Conclusion.....	9

CITATIONS

Cases:

<i>Acme Lumber Co. v. Shaw</i> , 243 Ala. 421, 10 So. (2d) 285.....	7, 8
<i>Bowman v. Pace Co.</i> 119 F. (2d) 858.....	6
<i>Brown v. Bailey</i> , 177 Tenn. 185, 147 S. W. (2d) 105.....	6
<i>Brown v. Carter Drilling Co.</i> , 38 F. Supp. 489.....	5, 6
<i>Craft v. Fish</i> , 5 Wage Hour Rept. 737.....	7
<i>Cushway v. Stork Engineering Co.</i> , 51 F. Supp. 568.....	7, 8
<i>Dollar v. Caddo Lumber Co.</i> , 43 F. Supp. 822.....	7
<i>Dotson v. Stowers</i> , 37 F. Supp. 937.....	6
<i>Deutsch v. Heywood Wakefield Co.</i> , 6 Wage Hour Rept. 546.....	7, 8
<i>Hart v. Gregory</i> , 220 N. C. 180, 16 S. E. (2d) 837.....	6
<i>Johnson v. Phillips-Buttorff Mfg. Co.</i> , 160 S. W. (2d) 893, certiorari denied, 317 U. S. 648.....	6
<i>Kirschbaum Co. v. Walling</i> , 316 U. S. 517.....	4, 5, 8
<i>Lefevers v. General Export Iron & Metal Co.</i> , 36 F. Supp. 838.....	6
<i>Mid-Continent Pipe Line Co. v. Hargrave</i> , 129 F. (2d) 655.....	7, 8
<i>Milam v. Texas Spring & Wheel Co.</i> , 157 S. W. (2d) 653.....	6
<i>Nichaus v. Joseph Greenspon's Son Pipe Corp.</i> , 164 S. W. (2d) 180.....	7
<i>Reeves v. Howard County Refining Co.</i> , 33 F. Supp. 90.....	7
<i>Reliance Storage & Inspection Co. v. Hubbard</i> , 50 F. Supp. 1012.....	7
<i>Robertson v. Oil-Well Drilling Co.</i> , 47 N. M. 1, 131 P. (2d) 978.....	5, 6, 7
<i>Rogers v. Glazer</i> , 32 F. Supp. 990.....	6
<i>Shepler v. Crucible Fuel Co.</i> , 6 Wage Hour Rept. 185, affirmed, 6 Wage Hour Rept. 936.....	7

II

Cases—Continued.

	Page
<i>Sieger v. Beard & Stone Elec. Co.</i> , 4 Wage Hour Rept. 411	7
<i>Walling v. Sondock</i> , 43 F. Supp. 339, reversed, 132 F. (2d) 77, certiorari denied, 318 U. S. 772	5
<i>Wood v. Central Sand & Gravel Co.</i> , 33 F. Supp. 40	7

Statute:

Fair Labor Standards Act, c. 676, 52 Stat. 1060 (29 U. S. C., sec. 203 (j));	
Sec. 3	2, 3

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 159

MRS. EULA MAY WALTON, ADMINISTRATRIX OF THE
ESTATE OF FRED WALTON, DECEASED, PETITIONER

v.

SOUTHERN PACKAGE CORPORATION, RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
MISSISSIPPI

BRIEF ON BEHALF OF THE ADMINISTRATOR OF THE WAGE
AND HOUR DIVISION, UNITED STATES DEPARTMENT OF
LABOR, AS AMICUS CURIAE

The Solicitor General submits this brief on behalf of the Administrator of the Wage and Hour Division, United States Department of Labor, as amicus curiae.

OPINION BELOW

The opinion of the Circuit Court for Claiborne County, Mississippi, awarding judgment in favor of petitioner, is unreported. The opinion of the Supreme Court of Mississippi, reversing the judgment of the trial court and rendering

final judgment for respondent, is reported in 11 So. (2d) 912. It also appears at page 5 of the printed record.

JURISDICTION

The judgment of the Supreme Court of Mississippi was entered February 15, 1943. The petition for certiorari was granted by this Court on October 11, 1943 (R. 18). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The respondent is engaged in manufacturing veneer from logs. It is conceded that substantial quantities of its output are shipped in interstate commerce. The petitioner's decedent was employed as a night watchman at said plant. Was the employee engaged in a process or occupation necessary to the production of goods for commerce within the meaning of Section 3 (j) of the Fair Labor Standards Act of 1938?¹

STATUTE INVOLVED

The pertinent provision of the Fair Labor Standards Act, c. 676, 52 Stat. 1060 (29 U. S. C.,

¹ Respondent has also raised questions as to the survivorship of the cause of action and the statute of limitations, but the court below found it unnecessary to pass upon these points. This brief amicus is concerned only with the question of coverage.

sec. 203.(j)), is Section 3 (j) which reads as follows:

- (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

STATEMENT

This suit was instituted by Fred Walton under Section 16 (b) of the Fair Labor Standards Act to recover unpaid overtime compensation allegedly required by Section 7. Upon the death of the plaintiff the action was revived in the name of his administratrix, petitioner herein.

According to the agreed statement of facts (R. 1), the respondent operates a plant at which it manufactures veneer from logs, and ships "a substantial part" of its products outside the State of Mississippi. During the period involved, the plant operated only during the day, and petitioner's decedent was employed as a night watchman (R. 1). He was required to make hourly rounds of the plant, punch a night watchman's clock at designated stations and to report any fires or trespassers (R. 2). A record or log of

the watchman's reports was preserved. The amount due for overtime, if liability exists, is stipulated between the parties (R. 3).

The trial court rendered judgment for the petitioner. The Supreme Court of Mississippi reversed and entered final judgment for respondent (R. 17).

ARGUMENT

PETITIONER'S DUTIES AS A WATCHMAN CONSTITUTED AN "OCCUPATION NECESSARY TO THE PRODUCTION" OF GOODS FOR COMMERCE WITHIN THE MEANING OF THE FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act applies to employees engaged in any "occupation necessary to the production" of goods for commerce. In *Kirschbaum v. Walling*, 316 U. S. 517, the Court held the work of watchmen to fall within this language.²

The decision of the court below is placed upon the supposed distinction that here a night watchman was involved and his duties were performed during hours when the plant was not in operation. But the *Kirschbaum* decision is not susceptible of such an interpretation. In that case this Court described the duties of the watchmen as protecting "the buildings from fire and theft." The employees performing such duties were among those

² In the *Kirschbaum* case, the watchman was the employee of the owner of the building, not of an employer producing for commerce. In the instant case, petitioner's employer itself manufactures and ships in interstate commerce.

held to be "engaged in an occupation 'necessary to the production of goods for commerce,' " and at least one of them was a night watchman (*Kirschbaum Record*; p. 63). Coverage was predicated upon the theory that "maintenance of a safe, habitable building is indispensable to" the production of goods for interstate commerce (316 U. S., at 524). The facts of the instant case fall squarely within this rationale. The watchman was employed "for the purpose of reporting any fires and trespassers" (R. 5). And even if his duties related only to the protection of the plant rather than the goods produced (R. 11), he was engaged in maintaining a building so that production could be carried on. The fact that this protection is afforded at night, when the need for it may be greater, is hardly a basis for denying coverage.

With the exception of the decision below, and possibly one district court decision, none of the many lower court cases concerning watchmen, whether they preceded or followed the *Kirschbaum* case, have made any distinction between watching

³ *Brown v. Carter Drilling Co.*, 38 F. Supp. 489 (S. D. Tex.), decided by Judge Kennerly, in which the point is not specifically made. This case was not appealed, but the Fifth Circuit subsequently reversed Judge Kennerly in *Walling v. Nondock*, 132 F. (2d) 47 (C. C. A. 5), certiorari denied, 318 U. S. 772, which involved watchmen with duties substantially the same as those of the watchmen in the case at bar. The New Mexico Supreme Court, in *Robertson v. Oil Well Drilling Co.*, 47 N. M. 1, 131 P. (2d) 978, has also noted that the *Brown* case is inconsistent with subsequent and controlling decisions.

duties performed while the plant was in actual production and the same duties performed during the night hours when the plant is closed.* In the one other case in which the point was noted, the distinction was rejected as of no consequence. *Robertson v. Oil Well Drilling Co.*, 47 N. M. 1, 131 P. (2d) 978, 980. The other cases have apparently assumed that it was immaterial when the watchman's duties were being performed. In some of the cases holding watchmen subject to the Act the facts show that the watchman was working while no production activities were in progress. *Johnson v. Phillips-Buttorff Mfg. Co.*, 160 S. W. (2d) 893 (Tenn. 1942), certiorari denied, 317 U. S. 648; *Walling v. Sondock*, 43 F. Supp. 339 (S. D. Tex.), reversed, 132 F. (2d) 77 (C. C. A. 5), certiorari denied, 318 U. S. 772; *Milam v. Texas Spring & Wheel Co.*, 157 S. W. (2d) 653 (Tex. Civ. App.); *Lefevers v. General Export Iron*

*The six watchman decisions relied upon by respondent (see brief in opposition to petition, p. 18) were all decided prior to this Court's decision in *Kirschbaum*. None of them explicitly made the distinction made by the court below. Three were decided on entirely different grounds not pertinent here. *Brown v. Bailey*, 177 Tenn. 185, 147 S. W. (2d) 105 (1941); *Dotson v. Stowers*, 37 F. Supp. 937 (S. D. W. Va.); *Bowman v. Pace Company*, 119 F. (2d) 858 (C. C. A. 5). *Rogers v. Glazer*, 32 F. Supp. 990 (W. D. Mo.), denied recovery to a night watchman on the theory that a watchman's duties were not necessary to production. *Hart v. Gregory*, 220 N. C. 180, 16 S. E. (2d) 837 (1941), held that a watchman must have some additional duties before being entitled to the benefits of the Act. *Brown v. Carter Drilling Co.* is discussed in the preceding footnote.

and Metal Co., 36 F. Supp. §38 (S. D. Tex.). In a number of other decisions it appears that the employee was a night watchman, who was probably working while the plant was not in operation.⁵ One court has indicated that the need for the watchman's protection may be greater when no operations are going on.⁶ Indeed, while the pro-

⁵ Since, before the United States entered the war, most plants did not operate at night, night watchmen were presumably on duty when no production was going on. *Mid-Continent Pipe Line Co. v. Hargrave*, 129 F. (2d) 655 (C. C. A. 10) (watchman for pipe lines and oil refinery, presumably both night and day); *Shepler v. Crucible Fuel Co.*, 6 Wage Hour Rept. 185 (W. D. Pa. 1943), affirmed on other grounds, 6 Wage Hour Rept. 936 (C. C. A. 3, 1943); *Nochans v. Joseph Greenspon's Son Pipe Corp.*, 164 S. W. (2d) 180 (Mo. App.); *Wood v. Central Sand & Gravel Co.*, 33 F. Supp. 40 (W. D. Tenn.); *Reliance Storage & Inspection Co. v. Hubbard*, 50 F. Supp. 1012 (W. D. Va.); *Dollar v. Caddo Lumber Co.*, 43 F. Supp. 822 (W. D. Ark.); *Reeves v. Howard County Refining Co.*, 33 F. Supp. 90 (N. D. Tex.); *Cushway v. Stork Engineering Co.*, 51 F. Supp. 568 (E. D. Mich.); *Acme Lumber Co. v. Shaw*, 243 Ala. 421, 10 So. (2d) 285 (1942). Cases in which it does not appear when the watchman worked, in which the court apparently did not regard it as of consequence, are *Craft v. Fish*, 5 Wage Hour Rept. 737 (Common Pleas, Scioto Co., Ohio); *Steger v. Beard & Stone Elec. Co.*, 4 Wage Hour Rept. 411 (N. D. Tex. (1941)); *Deutsch v. Heywood Wakefield Co.*, 6 Wage Hour Rept. 546 (S. D. N. Y. 1943).

⁶ This seems to have been the thought of the court in *Roberts v. Oil Well Drilling Co.*, 47 N. M. 1, 131 P. (2d) 978, 980, which involved a watchman for a drilling rig which had been dismantled and stored awaiting removal to a new location. In holding the employee covered, the court stated: "To have left this machinery unguarded during waiting periods between jobs, and to have thereby suffered loss or

duction employees are present it may well be that they can sufficiently protect the employer's property against fire and intruders and that a watchman is unnecessary.

The assumption by the court below that the Act had not been held applicable to employees having no duties other than strictly watching is likewise without merit. The *Kirschbaum* case and other decisions cited make it clear that watching duties alone constitute an "occupation necessary to the production." While the additional duties which a watchman may perform may add to the value of his services, they are not essential to his coverage under the Act.⁷

damage to the whole or some vital part, would surely, in some degree, have impeded, hindered, and perhaps destroyed that commerce" (*Mid-Continent Pipe Line Co. v. Hargrave*, 129 F. (2d) 655 (C. C. A. 10)).

⁷ See *Cushway v. Stork Engineering Co.*, 51 F. Supp. 568, 571 (E. D. Mich.), where the court said that watching duties alone are sufficient; the other duty "merely adds to the value of his services but does not control his status as an employee necessary to the production of goods for commerce." *Acme Lumber Co. v. Shaw*, 243 Ala. 421, 10 So. (2d) 285 (1942), where the court said: One "performing the duties of a night watchman * * * is an employee within the protection of the [Act]. The additional or incidental services * * * need not be considered * * *." *Deutsch v. Heywood Wakefield Co.*, 6 Wage Hour Rept. 546 (S. D. N. Y. 1943), where the court said that there was no difference "between an engineer, elevator operator, and a watchman."

CONCLUSION

The judgment of the Supreme Court of Mississippi on this point is erroneous and should be reversed.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

ROBERT L. STERN,
Special Assistant to the Attorney General.

DOUGLAS B. MAGGS,
Solicitor,

IRVING J. LEVY,
Associate Solicitor,

BESSIE MARGOLIN,

JOSEPH I. NACHMAN,

Attorneys,
United States Department of Labor.

DECEMBER 1943.

SUPREME COURT OF THE UNITED STATES.

No. 159.—OCTOBER TERM, 1943.

Mrs. Eula May Walton, Administratrix
of the Estate of Fred Walton, Deceased, Petitioner,
vs
Southern Package Corporation.

On Writ of Certiorari to
the Supreme Court of
Mississippi.

[January 3, 1944.]

Mr. Justice BLACK delivered the opinion of the Court.

This is a suit brought against the respondent by an employee, Fred Walton, in a Mississippi state court to recover overtime compensation and liquidated damages as authorized by Section 16(b) of the Fair Labor Standards Act of 1938.¹ Walton died before the case was tried and the suit was revived by his administratrix, the petitioner here. A judgment for the petitioner rendered by the trial court was reversed by the Mississippi Supreme Court² on the ground that Walton had not been employed in the production of goods for interstate commerce or in "any process or occupation necessary to the production thereof"³ and therefore was not covered by the Act. We granted certiorari because this interpretation of the Act raised a federal question of importance and because of the claim by petitioner that the interpretation was in conflict with our decision in *A. B. Kirschbaum Co. v. Walling*, 316 U. S. 517.

The case was tried on an agreed statement of facts which in brief summary showed:

The respondent operated a plant in Mississippi in which veneer was manufactured from logs. A substantial portion of the manufactured product was destined for shipment in interstate commerce. Walton worked at the plant as a night watchman. His work week exceeded the maximum hours prescribed by the Fair

¹ 52 Stat. 1069; U. S. C. Title 29, § 216 (1).

² 11 So. 2d 912.

³ Section 3 (j) of the Act provides that: "An employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, . . . such goods, or in any process or occupation necessary to the production thereof." 52 Stat. 1061; U. S. C. Title 29, § 206 (j).

Labor Standards Act during the period in question. His duties were to make hourly rounds of the plant, punch the nightwatchman's clocks at various stations on the plant, and report any fires and trespassers. The fire insurance company which insured the plant's buildings, machinery, and fixtures required respondent to have a night watchman as a condition to granting reduced premium rates. Respondent's desire to obtain these reduced rates was the primary reason why Walton was employed. The plant was not operated at night while Walton was on duty and he did not physically assist in the manufacture or shipment of veneer.

In holding that these facts fell short of proving that Walton's work was "necessary to the production" of respondent's goods, the Mississippi Supreme Court particularly emphasized that Walton had no other duties to perform in addition to his regular duties as a night watchman; that he engaged in no manual activities connected with production; that he was not specially employed to protect goods assembled for manufacture or awaiting shipment in interstate commerce; and that no goods were manufactured during the hours he was on guard. Under our decision in the *Kirschbaum* case, *supra*, no one of these facts standing alone, nor all of them together, can support the Court's conclusion that the nature of Walton's employment left him without the Act's protection. His duty was to aid in protecting the building, machinery, and equipment from injury or destruction by fire or trespass. The very fact that a fire insurance company was willing to reduce its premiums upon condition that a night watchman be kept on guard is evidence that a watchman would make a valuable contribution to the continuous production of respondent's goods. The maintenance of a safe, habitable building is indispensable to that activity. *A. B. Kirschbaum Co. v. Walling, supra*, 524. The relationship of Walton's employment to production was therefore not "tenuous" but had that "close and immediate tie with the process of production for commerce" which brought him within the coverage of the Act. *Ibid.*, 525.

The judgment is reversed and the cause is remanded to the Mississippi Supreme Court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Mr. Justice ROBERTS, considering himself bound by the decision in *Kirschbaum v. Walling*, 316 U. S. 517, concurs in the result.